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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 639.

VOLASCO PRODUCTS COMPANY and VOLUNTEER ASPHALT COMPANY,
Petitioners,

v.

LLOYD A. FRY ROOFING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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LLOYD A. FRY ROOFING COMPANY,
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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on September 12, 1962.

OPINIONS BELOW.

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported in 308 F. 2d 383. A copy of the Opinion is attached hereto in the Appendix to this Petition[1] at pages 1a et seq. No opinions were issued by the District Court.

JURISDICTION.

The judgments of the Court of Appeals for the Sixth Circuit were made and entered on September 12, 1962, and copies thereof are appended to this Petition in the Appendix at pages 25a-26a, 27a. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Whether an Appellate Court by setting aside a damage verdict based on uncontradicted testimony of two expert witnesses, both accountants, one in private practice and the other the President and General Manager of plaintiff's business, using approved accounting and statistical methods and the company's past experience, its own records and their expert judgment, as to the company's projected earnings of which it was deprived by reason of the violation by defendant of the antitrust laws, by weighing the evidence and concluding that "plaintiff in an effort to be specific, has indulged in theories that result in proof that is speculative, remote and uncertain," has thereby deprived plaintiff of the right to trial by jury as guaranteed by the Seventh Amendment?

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[1] The Appendix to this Petition is hereinafter referred to by the abbreviation "(A. . . .)."

2. Whether plaintiff in an antitrust action is entitled to recover in addition to loss of profits, depreciation in value of its property due to defendant's illegal actions as held by this court in **Story Parchment Company v. Paterson Parchment Paper Co.**, 282 U. S. 555 (1931), and by the Tenth Circuit in **Atlas Building Products Co. v. Diamond Block & Gravel Co.**, 269 F. 2d 950 (1959), cert. den. 363 U. S. 843, and, if so, can it recover only the difference between its investment as shown by its books and its actual value as of the date of suit, or may it recover the difference between such actual value as of that date and its value as a going concern assuming that there had been no antitrust violation?

3. Whether plaintiff, admittedly the object of a calculated and highly successful conspiracy in violation of the antitrust laws, involving discriminatory pricing as to the principal product of a line of allied products, may recover damages for loss of profit on the entire line of products directly and proximately caused by defendant's illegal acts?

4. Whether plaintiff, Volasco Products Company, can recover, as an element of damages, losses due to its being prevented from going into the manufacture of roll roofing and shingles, where it is equipped to manufacture asphalt saturated felt, mopping asphalt and roof coatings but needs additional machinery costing a relatively small amount to begin manufacture of roll roofing and shingles, which capital and equipment were readily available, but is prevented from manufacturing such additional products by antitrust violations of defendant?

5. Whether plaintiff, a new corporation, just getting started in the asphalt roofing business and having an estimated growth or development period of five years to reach its anticipated normal sales volume, which is prevented

from normal growth by the antitrust violations of defendant so that its growth period is lengthened, can recover in damages for the years of full normal sales of which it was deprived by being delayed in reaching its maturity, particularly since plaintiff's business life is limited to fifty years?

6. Whether the issue as to whether defendant alone monopolized or attempted to monopolize the asphalt roofing business was properly submitted to the jury where the evidence shows that defendant was the largest manufacturer of asphalt felt in the United States, that it engaged in the practice of "conditioning the market" by lowering prices in the area of a plant defendant was trying to buy, that of 14 price changes in the price of asphalt felt between February, 1956 and March, 1958, defendant alone initiated all but three, defendant initiated all five of such changes which resulted in price increases, that defendant lowered the price of felt below cost in the plaintiff's area, resulting in one independent manufacturer being forced out of such area and plaintiff being excluded from the manufacture of additional roofing products, even though defendant accounted for only 12½ per cent of national sales of asphalt felt? That is, where all elements of monopoly are present, is defendant to be held not guilty as a matter of law because it has only 12½ per cent of the market? Furthermore, can this question be raised on appeal where no adequate objection was made to the Court's charge?

7. Whether the so-called "Two Issue Rule" established by Tennessee Statute (Section 20-1317, Tennessee Code Annotated), to the effect that a general verdict is good in a multiple issue case where there is substantial evidence to support the verdict on one or more counts even though insufficient to sustain on an erroneously submitted issue, controls in a Federal case, and particularly where the de-

fendant fails to avail himself of the opportunity to request special verdicts or interrogatories as provided for by Rule 49, Federal Rules of Civil Procedure.

8. Whether the Federal Courts should as a matter of law deny relief to the plaintiff, Volunteer Asphalt Company, for damages suffered by it due to the antitrust violations of the defendant merely because plaintiff is a supplier and, therefore, "too remote to be compensable", where plaintiff is a part of an integrated business operation processing asphalt for road and roofing purposes, processes for only two customers, one for road asphalt and Volasco Products Company for roofing asphalt, processes all the asphalt used by Volasco in the manufacture of asphalt roofing products, and the two plaintiffs have identical stock ownership?

CONSTITUTIONS, STATUTES AND FEDERAL RULES INVOLVED.

The statutes involved are Sections 1 and 2 of the Sherman Act (15 U. S. C., §§ 1, 2), Section 2 (a) and (b) of the Clayton Act as amended by the Robinson-Patman Act (15 U. S. C., § 13 (a) and (b)), and Section 4 of the Clayton Act (15 U. S. C., § 15) set forth in the Appendix hereto at pages 27a-29a; 28 U. S. C., § 2072 set forth in the Appendix hereto at page 30a; Tennessee Code Annotated, Section 20-1317, set forth in the Appendix at page 32a. Federal Rules of Civil Procedure Numbers 49, 51 and 61 are involved and are set forth in the Appendix hereto at pages 30a-31a. The Constitutional provision involved is the Seventh Amendment to the Constitution of the United States set forth in the Appendix at page 30a.

STATEMENT OF THE CASE

I.

SUMMARY STATEMENT

This action was filed by petitioners in the District Court to recover treble damages under the Sherman Act and the Clayton Act as amended. The complaint alleges that Volunteer Asphalt Company (hereinafter referred to as Volunteer) is a refiner and processor of asphalt for highway and roofing uses having begun business in 1954. Volasco Products Company (hereinafter referred to as Volasco) began business in 1955 as a manufacturer of asphalt roofing products; that the defendant, Lloyd A. Fry Roofing Company (hereinafter referred to as Fry, or defendant) is the largest manufacturer of asphalt roofing products in the United States, and that it conspired with other large manufacturers to restrain trade in the asphalt roofing industry; that it monopolized or attempted to monopolize, or conspired with others to monopolize, trade in the manufacture and sale of asphalt roofing products, and that it discriminated in the price of its products by reducing prices in the areas served by plaintiff to or below cost while keeping prices higher in other areas, thereby substantially lessening competition and tending to create a monopoly or to injure or destroy or prevent competition with defendant (R. 29-35).[2] The defendant denied the material allegations of the Complaint (R. 36-37).

The Complaint was filed on April 17, 1958 (R. 2), the trial by jury commenced on November 14, 1960 (R. 51). At the conclusion of plaintiffs' proof, the Court granted

[2] The abbreviation "R" refers to the Joint Appendix filed in the Sixth Circuit. Reference to page numbers therein will omit the letter "a"

defendant's Motion for a directed verdict as to Volunteer (R. 1580, 2480), and on December 19, 1960, the jury returned a verdict in favor of the petitioner, Volasco, in the amount of $100,000.00 (R. 2245). The Court tripled the verdict, fixed petitioner's attorneys' fees at $60,000.00 and entered a judgment in favor of the petitioner against the respondent for the sum of $360,000.00 (R. 2479, 2480). Respondent, Fry, and petitioner, Volunteer, perfected appeals, and petitioner, Volasco, a conditional appeal on the question of damages only, to the United States Court of Appeals for the Sixth Circuit (hereinafter sometimes referred to as Sixth Circuit) (R. 2527, 2533, 2535).

In its Opinion, the Sixth Circuit held that there was sufficient evidence to support the verdict of the jury on the issue as to whether the defendant combined or conspired with one or more other manufacturers to violate the antitrust laws (A. 6a-11a). It further held, however, that there was insufficient evidence and that the trial court's charge was inadequate to submit to the jury the issue as to whether defendant, individually, monopolized the asphalt roofing industry, and that since the jury returned a general verdict and one issue was improperly submitted, the entire verdict must be set aside (A. 11a-14a). The Court below went further and held that plaintiffs' proof as to amount of its damages was defective or improper in the following particulars:

1. That since the price discrimination charged to respondent was limited to the principal product of the petitioner, Volasco, that is, asphalt saturated felt, petitioner could not recover for loss of profits in other roofing products manufactured by it, such as mopping asphalt and roof coatings (A. 18a).

2. That estimates made by plaintiff's president, himself a certified public accountant, and by another certified

public accountant, both of whom had made market studies and had examined plaintiff's records, as to probable profits plaintiff would have earned but for the illegal actions of the respondent, was improper, the Court stating "We believe that here the plaintiff in an effort to be specific, has indulged in theories that result in proof that is speculative, remote and uncertain" (A. 16a).

3. That the trial court erred in permitting plaintiff to introduce evidence as to injury to its business in addition to its loss of profits, because it was a duplication of damages (A. 14a-16a).

On the appeal of Volunteer Asphalt Company, the Court held that although petitioner, Volunteer, supplied all asphalt used by Volasco, yet it is too remote from the direct injury to recover damages resulting from the violation of the antitrust laws (A. 19a-23a).

On Volasco's conditional appeal, the Appellate Court, below, although ordering a new trial, held in effect as a matter of law that although plaintiff fully intended to go into the manufacture of roll roofing and shingles and needed only $60,000.00 worth of additional manufacturing equipment to enter upon the manufacture of these products, and although plaintiff was prevented from making the necessary investment and going into the production of such products by the actions of respondent in violation of the antitrust laws, yet plaintiff could not have submitted to the jury the questions as to whether it had the intention and whether it had substantially acquired the facilities to manufacture these products and, if so, whether it had suffered damages as a result of respondent's actions (A. 21a-23a). The Appellate Court further sustained the trial court's exclusion of petitioner's proffered evidence as to its loss of profits on the theory that it had been deprived

of two or more mature years of operation by respondent's action (A. 23a-24a).

It is respectfully submitted that the Court below committed error in each of the rulings above listed in that its actions constituted weighing the evidence, thus invading the province of the jury; in that its refusal to permit the introduction of evidence amounted to a denial to petitioner of a jury trial, and in that its rulings on matters of law are in direct conflict with rulings upon the same propositions by Courts of Appeals of other Circuits and are in conflict with applicable decisions of this Court on the same matters, and in that it has decided important questions of Federal law, which have not been but should be settled by this Court.

II.

THE FACTS.

A. Background and Parties.

The manufacture of asphalt roofing products is a comparatively simple process (R. 135, 136). In the manufacture of asphalt saturated felt, dry felt paper is run through a machine, sprayed, and dipped in hot asphalt, dried and rolled up into rolls of 60 pounds each. There are two principal grades of asphalt felt, one known as 15 pound felt and the other as 30 pound felt, the only difference being in the weight of the dry felt used in manufacturing it (R. 90-92). The manufacture of roll roofing and shingles is merely a continuation of this process through additions to the felt saturating machine whereby the saturated felt is coated with asphalt and, depending upon the type of end product, sprinkled with mica or granules and either made into roll roofing or cut into the shape of shingles. (This testimony was inadvertently omitted by

the printer from the Joint Appendix. It should have appeared at R. 98. It is printed in the Appendix hereto at pp. 32a-34a).

Other asphalt roofing products manufactured and sold by Volasco are mopping asphalts used with asphalt felt in the construction of built-up roofs (R. 84, 645) and roof coatings of various grades, used primarily in roof maintenance (R. 86-88). These products are not made on the roofing machine but are packaged in cans or drums (R. 85, 86).

George C. Krug, a man with a very broad background of experience in accounting, as a certified public accountant with several large nationally known accounting firms and with a broad background of experience in business (R. 55-68, 576-593), together with his brother, J. A. Krug, made a study of business opportunities in the Knoxville area and, after consultation with experts in the asphalt roofing business and with Shell Oil Company, decided to go into the business of handling, processing, and selling road asphalt and a complete line of asphalt roofing products (R. 68-74, 76, 77, 612-613).

When plaintiff began business it intended to sell asphalt roofing within an area extending approximately 200 miles from the City of Knoxville (R. 71-72, 143, 614, 615). The studies made showed the population of this area to be 8,500,000 people, which indicated there would be a potential annual market for the sale of 1,601,000 rolls of asphalt saturated felt (R. 133, 908).

Originally, the business was a partnership of the two Krug brothers under the name Tennessee Associates (R. 76, 560, 561). In the year 1954 they organized Volunteer Asphalt Company to conduct this business, acquired land adjacent to the Fort Loudon Lake on the Tennessee River near Knoxville, built docking and storage facilities, stills

and other processing equipment and began their business of storing, processing and shipping road asphalts and pouring and selling mopping asphalt for roofing (R. 74-78, 89-90, 139-141). Their plans included the construction of a complete asphalt roofing plant for the manufacture of asphalt saturated felt, roll roofing, shingles, various roof coatings and other asphalt products (R. 77, 131-133, 139). During 1955 for financial reasons, they determined to organize Volasco Products Company to carry on the asphalt roofing phase of the business (R. 141). A large building was erected for the roofing business, an asphalt saturating machine was purchased and installed and plaintiff actually began the manufacture and sale of asphalt saturated felt during October, 1955 (R. 103, 104, 541; Ex. 163, R. 539-540, 2330).

Plaintiff employed a salesman in the Fall of 1955 with instructions to concentrate on the area immediately surrounding Knoxville at first and gradually to work out (R. 495-496, 507, 634-635). At that time plaintiff sought to find out and follow the prices of the major roofing manufacturers in setting the price it charged for saturated felt (R. 158). In the Spring of 1956, when it had sufficient cost information to determine its own prices independently of other manufacturers, it set a price for felt of $2.25 per roll to dealers and $2.15 a roll to large volume buyers (R. 177-179, 212-213). On August 14, 1956, defendant's bulletin giving 7½ per cent discount on non-perforated felt cut under plaintiff's then going price for the product and, from that time forward, plaintiff merely sought to find out the price as established by the majors and to sell its product at such prices as they were always lower than $2.25 per roll (R. 773, and see chart on page 25 hereof).

The Lloyd A. Fry Roofing Company was organized in 1933 by Lloyd A. Fry, Sr. (R. 1912). In 1945 defendant

built four roofing plants, at Houston, Minneapolis, Brooksville and Detroit, and a felt mill at Portland, Oregon (R. 1915). Since 1948 it has acquired by lease, purchase or construction seven roofing plants at the following locations: San Leandro, California; Robertson, Missouri; York, Pennsylvania; Moorehead City, North Carolina; Jacksonville, Florida; Irving, Texas; Ft. Lauderdale, Florida, and Emmaus, Pennsylvania (R. 1489). As of the date of the filing of this suit in April, 1958, defendant owned nineteen roofing plants and fourteen felt mills, strategically located throughout the United States (R. 154, 155, 1918). As of the date of trial it was in the process of constructing three additional plants at Lubbock, Texas; Atlanta, Georgia, and Salt Lake City, Utah, and was planning the construction of another at Cleveland, Ohio (R. 2059). In addition to roofing plants, defendant also owns eighteen asphalt refineries, one at each of its plants except Stroud, Oklahoma, which supply not only Fry's asphalt requirements, but defendant also sells to the other national manufacturers (R. 2096-2097, 2102-3). Fry is the largest producer of asphalt roofing products in the United States (R. 558). Asphalt roofing products are heavy compared to their value and shipping costs represent a very substantial element of total cost of the product to the consumer (R. 70-71, 484, 1478). A manufacturer, therefore, has a definite competitive advantage in the immediate vicinity of his own plants (R. 621, 908-9).

Defendant has followed the policy of selling primarily through very large so-called distributors, including Sears Roebuck and Company, and, prior to 1956, at a price five to eight per cent below the price of his national competitors (R. 1069, 2032). During 1956 Fry changed his sales policy and endeavored to sell at the same price level as his national competitors and granted the distributors a discount only on direct shipment to dealers (R. 170, 1070,

1127, 1951, 2033-34). On November 1, 1956, however, he reverted to his prior policy of selling below his national competitors by giving certain of his customers a secret five per cent year-end rebate (R. 222-3, 1128-31, 1513-14) and by extending the distributor discount on all purchases of his customers (R. 215).

The class of customers which his so-called distributors were supposed to sell are described in his price bulletins as follows: "to retail dealers and or roofing contractors" (R. 171). The other national manufacturers, while they sold to some so-called distributors, also by and large sold directly to retailers and roofing contractors (R. 1841-44, 1871-72, 1873-89, 1965-66), and Fry sought to enable his customers to compete with manufacturers (R. 2012, and see price table, post). While this conflict in marketing methods existed in various parts of the United States (R. 1079), it apparently did not tend to reduce the price except in areas where new or small independent roofing manufacturers marketed their products (R. 771-2).

During the four fiscal years, 1955 through 1958, inclusive, the defendant earned net before income taxes a total of $17,147,838.00 and, after taxes, $7,958,611.00 (Ex. 126; R. 458, 2301); on a stockholders investment as of October 31, 1955, of $10,741,569.00 (Ex. 127; R. 459, 2305).

The next seven largest producers in order are the Ruberoid Company, Certain-Teed Corporation, Johns Manville Corporation, the Flintkote Company, the Philip Carey Manufacturing Company, the Barret Division, Allied Chemical Company and Bird and Son (R. 556-8). In the year 1954 the four largest producers accounted for forty-two per cent of the total shipments of asphalt roofing products and the eight largest companies accounted for sixty-nine per cent of total shipments (R. 1582).

B. Pricing and Sales Policies of Fry and Other Major Companies.

Prior to plaintiff's entry into business, the national manufacturers of asphalt roofing, other than Fry, had followed a pricing system of f. o. b. plant prices with freight added to the point of delivery except that freight was equalized to that of the competitor with the plant nearest to the point of destination (R. 1952). The defendant followed an independent pricing policy, and, for some time prior to plaintiff's entry into the business, was selling at a flat delivered price, the same price applying throughout the South and East Central states. For example, Fry's last published price list prior to plaintiff's selling felt was effective August 1, 1955 (Ex. 28, R. 161); and under it the price of asphalt saturated felt was $2.24 per roll delivered to any point in the States of Tennessee, Mississippi, Alabama, Georgia, North and South Carolina, Virginia, Kentucky, or Indiana (R. 158, 162-4, 1505). At the same time the price of other national manufacturers under their system would vary throughout this area, but their delivered price in the Knoxville area was $2.44 per roll (R. 159, 1952).

As of November 1, 1955, shortly after plaintiff began selling felt, the defendant published a new price list under which the delivered price of asphalt saturated felt to any point throughout the area indicated was drastically reduced to $1.84 per roll, and the Knoxville price of other national manufacturers became $2.00 per roll during the winter (R. 164-7; Ex. 29, R. 166).

During these early months, Volasco found out the price of the major manufacturers other than Fry, and began selling at $2.44 a roll and, as the price of the major manufacturers was reduced, plaintiff adjusted its price and sold at $2.12, $2.11 and $2.00 a roll and then, on one day

only, sold at $1.84 a roll (R. 167-8; Ex. 156, R. 499). During this entire time, up to late March, 1956, Fry was underselling Volasco by eight per cent except for the one day's sales at $1.84.

The Asphalt Roofing Industry Bureau, an organization of roofing manufacturers, apparently held semi-annual meetings, one in the Fall and another in the Spring of each year. The defendant did not belong to the Bureau and, prior to October, 1955, its officers had never attended a meeting (R. 1144). However, they were invited to attend a meeting held at the Westchester Golf and Country Club in Rye, New York about the middle of October, 1955, and Mr. Lloyd A. Fry, Jr., President of the defendant, attended, participated in a golf match, and attended a cocktail party and a dinner afterwards. He insists, however, that he did not attend any of the business sessions (R. 1132-34, 2065). Present on this occasion were practically everyone in the roofing industry, large, small and otherwise, including representatives of most of the national manufacturers of asphalt roofing products (R. 1132-34), and Mr. Fry talked and exchanged salutations with all of them (R. 1134).

Effective February 19, 1956, after working on it for some time, Fry published and issued an entirely new pricing schedule (R. 1505-6, 1951-52, 1976-80). This schedule, a very complicated document, showed separate prices for asphalt roofing products for each of twenty different zones, and each county in each state of the United States east of the Rocky Mountains was assigned a zone number. In order to determine the price of a product at any point, one would look up in the list of states and counties on the back of the price schedule the zone number applicable to the county in which the point was located. Then, in the front part of the price schedule, one would find op-

posite the name of the product to be purchased and under the zone column the price applicable (Ex. 30, R. 168-174). Under this price schedule, the counties in which an asphalt roofing plant of either the defendant or any of its competitors was located were placed in zone 1 or the lowest price (Ex. 30, R. 175, 1505-6, 2042). Theoretically, the price increased in other counties based on the cost of delivery from the factory point to such surrounding counties (R. 191-2, 1506). Actually, the price differential bore little, if any, relation to delivery costs, however, for the difference in price between Knox County and Johnson County in Tennessee, a distance of over 100 miles, was only 1¢ per roll while the difference between Franklin County, where Fry had a plant, and the adjoining county of Rush in Indiana was 4¢ (R. 176, 193; Ex. 30, R. 168; Ex. 33, R. 174, 188). Knox County was the nearest factory point to Johnson County (R. 175; Ex. 33; R. 188). This system of pricing continued on until March 3, 1958 (R. 266, 2004; Ex. 33; Ex. 53, R. 262). Under this pricing schedule, Knox County, Tennessee, was fixed as a factory point and placed in zone 1 for all asphalt roofing products, although plaintiff's plant was the only asphalt roofing plant within two hundred seventy-five to five hundred miles of Knoxville (R. 132, 141-5, 175, 2042; Ex. 30, R. 169), and plaintiff had just begun business and manufactured at that time only asphalt saturated felt and mopping asphalt, not shingles or roll roofing (R. 90, 140).

This new pricing plan represented a substantial price increase throughout the industry, and, under it, the delivered price of asphalt saturated felt to distributors in Knoxville was $2.16 per roll (R. 168-175, 762, Ex. 30).

(As stated previously, plaintiff, based on its cost, in April 1956, set a price for felt throughout the area immediately surrounding Knoxville at $2.25 per roll to

dealers and approximately $2.10 to $2.15 per roll to buyers in large quantities. R. 179, 2123.)

The defendant developed and initiated this price change (R. 189, 1121, 1506, 2041-2). Immediately and effective the same day, that is February 19, 1956, or within a day or so thereafter, all the major roofing manufacturers abandoned their former pricing methods and published price lists identical with that of the defendant even down to errors contained in it (R. 190, 2033-34; Ex. 30, R. 168; Ex. 95, R. 372; Ex. 96, R. 374; Ex. 97, R. 376-7).

This was such a different pricing system that defendant had its plant managers come to Chicago for a meeting during January, 1956, to have the plan explained to them (R. 1511-13, 1980). On February 23, 1956, four days after the effective date, J. J. Musico, the manager of defendant's plant at Brookville, Indiana, which plant served Knoxville and a large portion of the surrounding area (R. 1918-19), wrote to C. M. McClung and Company, a Fry customer in Knoxville, apparently answering a complaint about the pricing of some competitor, stating:

> "I know by this time that you have the new merchandising plan **which I understand the entire industry has adopted**, and it is with my very honest opinion that this will clean up all this mess and I am sure will be somewhat embarrassing to someone to fill all the orders that they may have and extend the payments until April 10.
>
> . . . . . .
>
> "In view of the new merchandising plan, I do not think any further investigation is necessary. **I am of the firm opinion that the Roofing Industry's House should be, and will be clean, for the first time,** as certainly there is no reason for any such chiseling." (Emphasis ours.) (Ex. 123, R. 878, 2294.)

During the Spring of 1956, another meeting of the Asphalt Roofing Industry Bureau was held, this time at the Blackstone Hotel in Chicago, and both Mr. Fry, Jr., President of the defendant, and Mr. Fry, Sr., Chairman of the Board and Chief Executive Officer of the defendant, attended the social sessions, including cocktail party, and dinner (R. 1135, 1137, 2066). Most everyone in the roofing industry was present, including representatives of Ruberoid, Certain-Teed, Johns-Manville, Philip Carey, Bird and Son, Logan-Long, and Celotex (R. 1136-37).

Effective April 9, 1956, defendant published a new price schedule which was identical with its schedule of February 19, 1956, except that it corrected errors in the former list, and it omitted in mailing the list to dealers, the page containing discounts to distributors (R. 1981, 2042; Ex. 31, R. 180). In this connection, it is pointed out that in the February 19, 1956 price list, while Knox County was listed as Zone 1 with a price of $2.16 on felt, Blount County, which adjoins Knox, was listed as zone 7, with a price of $2.23, while other adjoining counties were zone 2 with a price of $2.17 (R. 176). This listing of Blount County was apparently an error, and in the April 9th price list, Blount County was placed in zone 2, in line with other surrounding counties (R. 180). This same mistake was contained in the price list of Ruberoid sent out with letter dated February 17, 1956, the list of Johns-Manville sent out with letter dated February 20, 1956, and of Certain-Teed, effective February 20, 1956 (R. 371, 373, 376). On April 13, 1956, Mr. Musico, manager of Fry's Brookville plant, wrote a letter to House-Hasson Hardware Company, another Fry customer in Knoxville, as follows:

> "I refer to your letter of April 9 and no doubt by this time you have received our new schedule and changes in our county zone outline.

"You will note that Blount County is now zone 2 which puts it in line and **I am sure that you will find all other manufacturers quoting on this same basis.** If you find anything quite to the contrary, please try to pick up some tangible evidence and we will handle same." (Emphasis ours.) (Ex. 124, R. 442; 2295.)

On April 27, 1956, in answer to a letter from Peaslee-Gaulbert Corporation, a large customer of Fry throughout the South-Central portion of the country, passing on a complaint from one of its customers, Mr. Lloyd A. Fry, Jr., President of defendant, stated:

"This will acknowledge receipt of your letter dated April 24th regarding the letter you have received from Erst Long with respect to certain prices being quoted on Asphalt Felt by Bear Brand at Bearden, Arkansas.

"**I am well aware of the activities of these small Arkansas manufacturers and I assure you that we are watching them very closely.** As usual, they are taking advantage temporarily, of an attempt to stabilize an industry which is long overdue for some stabilization from the viewpoint of the wholesalers, dealers, and roofers. These people are opportunists and are much like the backwood sawmill operator who hauls a load of lumber into any given market and announces that he is a dealer.

"Nevertheless, **I agree that they are a thorn in the side and in due time will be dealt with.**

"Please advise Mr. Long that I would appreciate his patience and support of the new Merchandising Plan and Price Plan for a bit longer because there is a great deal of low-price materials in the territory which was purchased prior to the increase. The market will continue to be unsettled until these in-

ventories have turned. I believe that this will be accomplished within thirty days. **At that time, if the menagerie is not changed there we will take corrective action.**" (Emphasis ours.) (Ex. 34, R. 201-2, 2289.)

The smaller roofing companies in the Southwest area had names such as Bear Company, Elk Roofing Company, and Leopard Roofing Company, so that the industry referred to them, collectively, as the "menagerie" (R. 203).

Effective June 15, 1956, the defendant and other national manufacturers issued a revised merchandising plan and price list (R. 203, 379-87). This pricing schedule follows the same format as the April 9 list except that there were two series of zone numbers designated as Schedule A and Schedule B; each containing 20 zones. The B Schedule covered, generally, the Southwest area of the country, "the menagerie area" (R. 204-5). Under this price schedule, the price of asphalt roofing products was increased in the A zone, covering most of the country, but in the B zone area it remained the same. The price on asphalt saturated felt went up from $2.16 a roll to $2.22 a roll in zone 1 under the A schedule, which included Knox County, while the price in zone 1 on the same product in the B area remained at $2.16 per roll (R. 205). Defendant was again the one who devised and established this price schedule (R. 206-10, 1507-8).

Effective August 14, 1956, the defendant issued a bulletin applying to the States of Mississippi, Tennessee, Alabama, and certain counties in Louisiana, Georgia, and Florida, allowing an additional trade discount of seven and one-half per cent "on straight truckloads and or straight carloads of 15 lb. and or 30 lb. asphalt saturated felt (not perforated)" (R. 210-11). Plaintiff was not equipped to manufacture perforated felt but manufactured only non

perforated felt (R. 212, 766). Perforated felt is manufactured by running the regular felt over a roller containing needles which punch small holes in it (R. 212). There is no determinable additional cost involved in the manufacture of perforated as compared with non-perforated felt, and it normally sells at the same price (R. 212).

The first Mr. Krug learned of the additional seven and one-half per cent discount, which, incidentally, reduced the price in Knoxville, Tennessee, to $2.05 per roll to distributors (R. 212) was shortly after its announcement in August, 1956, through Foy Roofing Company, a handler of Fry Roofing (R. 766, 1284, 1855). Mr. Fry, Jr., stated that he issued this bulletin to meet competition "as a result of reports that we had from the field that Ruberoid and other manufacturers were quoting these prices" (R. 1982-84, 2043-44). However, the Ruberoid Company granted the seven and one-half per cent discount on non-perforated felt by bulletin issued August 14, 1956 (the same day as Fry), Johns-Manville by bulletin issued August 24, 1956, and Philip Carey Manufacturing Company by bulletin issued August 23, 1956 (R. 388, 390, 391).

During October, 1956, the Asphalt Roofing Industry Bureau held another meeting. Mr. Fry, Jr., attended the social function connected with the meeting which was held at the Essex House in New York City (R. 1138). At this meeting also, most of the national manufacturers were represented including Ruberoid, Certain-Teed, Johns-Manville, Flintkote, Philip Carey, Bird and Son (R. 1139-40). The defendant attended no other functions of the Bureau than the three which have been mentioned herein, that is, in the Fall of 1955 and Spring of 1956 and October of 1956 (R. 1144, 2066). Although Mr. Fry, Jr., met with representatives of Ruberoid sometime during 1957 to discuss the possibility of manufacturing products

for Ruberoid and buying other products from Ruberoid (R. 1145).

Effective November 1, 1956, which is the beginning of the defendant's fiscal year, Fry secretly notified most of its customers that it would pay at the end of each fiscal year a five per cent rebate on their total purchases of asphalt roofing products (R. 222-3, 1128-31). This rebate was so secret that the customers were notified by telephone or by personal visit by the President of the defendant, and even the deefndant's sales manager did not learn of it until during the taking of discovery depositions in this lawsuit in the Fall of 1959 (R. 1130, 1513-14, 1616, 2028). And defendant's salesman in this area didn't learn of it until January, 1960 (R. 1898). These rebates were paid by cashier's checks and not by defendant's own checks (R. 223, 1129, 2029), and were made to customers at the end of the fiscal year except that Sears was paid quarterly during the year (R. 1522). While Mr. Fry, Jr., at first testified this rebate was paid to all his distributor customers, he finally admitted it was not paid to all (R. 2056-7), but that it was paid where competition was keen and not paid in areas where competition was not so severe (R. 2057-8). Distributors in the Knoxville area did receive it (Ex. 240, R. 1556-1568).

By price and zone schedules effective November 1, 1956, defendant again changed the price on asphalt roofing products including asphalt saturated felt (R. 213-17). The defendant developed and initiated this price change, and it was immediately adopted by other manufacturers (R. 221-2, 391-2, 398-400, 1509).

Under this schedule, the country, east of the Rocky Mountains, was divided into four different price zones designated A, B, C, and D. The A zone was the highest priced zone, and the D zone the lowest with B and C grad

nated in between. Knox County, Tennessee, was placed in the B area, and the distributor price on asphalt felt was set at $2.17 per roll. This was a decrease of five cents per roll based on the June 15th price list but represented an increase of some twelve cents per roll on non-perforated felt based on the August 14th special bulletin. It represented a still further increase in the A area, the price in zone 1 of the A area to distributors being $2.24 per roll as compared with the former price of $2.22 per roll. The A area was in the northern part of the country, including the Chicago area where many of the national manufacturers had plants. The C zone was generally through the deep South. The D zone was the Southwestern part of the country, being that area formerly covered by the B zone in the June 15th price list, and the delivered price in the D zone was reduced from $2.16 to $1.96 (Ex. 38, R. 213-217, 1984-85). Effective with all sales made on and after November 1, 1956, the additional five per cent discount should be applied to defendant's published price making the zone 1 price of felt in the four areas actually as follows: A-1, $2.13; B-1, $2.06; C-1, $1.90; and D-1, $1.86 (R. 214-15, 217, 223-4).

From this time on during the material period until this suit was filed by the plaintiff, there were a number of price changes in the asphalt roofing industry, some representing decreases and others increases in price. The general trend, however, was a decrease in price in the Knoxville area, while in other areas the trend was an increase (Ex. 125, R. 443-58, 2297). For instance, the price in Knox County, Tennessee, was lowered to $1.83 per roll in January of 1958, whereas in Chicago, Illinois, where defendant and other major manufacturers had plants, it was increased to $2.28 per roll (R. 253; 259-60, 452). Also, under a price schedule issued on February 14, 1958, effective January 27, 1958, "Knoxville, Tennessee, has been eliminated as a factory point on all asphalt roofing products,

except asphalt saturated felt" (Ex. 54, R. 262). Under this bulletin the price of asphalt saturated felt was reduced in Knox County, Tennessee, to $1.65 per roll, while the price of asphalt shingles, roll roofing, and similar products was increased in the same area (R. 262, 264). Volasco did not manufacture roll roofing and shingles (R. 140).

Finally, on March 3, 1958, defendant changed entirely its pricing format and system, abandoning the county zone system and establishing a uniform list price for its products all over the United States east of the Rocky Mountains. The list price on asphalt saturated felt was set at $3.60 per roll, and, from this price, varying discounts were allowed depending upon the section of the country. In most cases, these discounts applied to statewide areas. Separate discount sheets were issued for each state, and the distributor discount for the State of Tennessee was fifty-two per cent plus six per cent, or a net published distributor price of $1.62 per roll on felt and a net price, after taking into account defendant's secret year-end rebate, of approximately $1.54 per roll (R. 266, 267, 2004, 2005).

The price after all discounts was $1.67 to $1.90 in Kentucky, $1.79 in North Carolina, $1.79 in South Carolina (Ex. 53, R. 262, 266-7). The defendant could give no specific reason for the low price in Tennessee other than the general statement that he was meeting competition (R. 2005-6, 2051-56).

As of March 3, 1958, no one except defendant Fry had sold or offered felt for sale in the Knoxville area at a price even as low as $1.62 per roll (R. 2052; Ex. 451; R. 2173, 2469-78). This price schedule also was initiated by defendant (R. 1076-77, 1126) and followed by other manufacturers (R. 432-34).

A tabulation of prices of asphalt saturated felt under the various price lists published by the defendant from August, 1955, through March, 1958, follows:

Price List Date	Knoxville	Brookville	Chicago	Exhibit No.	R. Page
8- 1-55	2.24	2.24	2.24	28	161
11- 1-55	1.84	1.84	1.84	29	166
2-19-56	2.16	2.16	2.16	30	168
4- 9-56	2.16	2.16	2.16	31	180
6-15-56	2.22	2.22	2.22	35	203
8-14-56	2.05	2.22	2.22	37	210
11- 1-56	2.17 (2.06)[3]	2.17 (2.06)	2.24 (2.13)	38	213
12-26-56	2.17 (2.06)[4]	2.17 (2.06)	2.17 (2.06)	40	226
2- 4-57	2.00 (1.90)	2.17 (2.06)	2.17 (2.06)	41	229
3-16-57	2.09 (1.99)	2.29 (2.18)	2.29 (2.18)	42	236
5- 8-57	1.98 (1.88)	2.29 (2.18)	2.29 (2.18)	43-46	238-41
7-18-57	2.03 (1.93)	2.03 (1.93)	2.28 (2.17)	50	249
10- 3-57	1.91 (1.81)	2.03 (1.93)	2.28 (2.17)	51	258
1- 2-58	1.83 (1.74)	2.03 (1.93)	2.28 (2.17)	52	259
1-27-58	1.65 (1.59)	2.03 (1.93)	2.28 (2.17)	54	262
3- 3-58	1.62 (1.54)	1.90 (1.80)		53[5]	262

Note: The exhibits are price lists which due to their voluminous nature were not printed in the joint appendix because of the undue expense involved. We do not believe the prices listed will be disputed.

[3] Figures in parenthesis show net sales price after the secret year-end rebate of five per cent.

[4] Adjoining counties to Knox price reduced to $2.05 (1.95) (R. 867).

[5] The Illinois discount sheet was not included in Exhibit 53 (R. 267).

C. Competition in the Roofing Industry.

The national manufacturers selling in the Knoxville area, in addition to Lloyd A. Fry Roofing Company, were the Ruberoid Company, Certain-Teed Products Corporation, Johns-Manville Corporation, the Flintkote Company, the Philip-Carey Manufacturing Company, the Barret Division of Allied Chemical Company, Bird and Son, Logan-Long, United States Gypsum Company, and the Celotex Company (R. 166, 555, 640-42, 1839, 1930). In addition to these, the only small or independent companies selling in the Knoxville area, other than plaintiff, were the Ohio Paper Company, which sold felt only, and, perhaps, the

Palmer-Ball Company in the Kentucky area (R. 555-56, 606-10). All of the so-called national or major companies above listed also sold asphalt roofing products in the Chicago and Brookville area and other areas in which the defendant sold (R. 1501-02, 1925-28). Prior to 1958, the Ohio Paper Company sold a very substantial volume of asphalt saturated felt in the East Tennessee area (R. 1575). Their policy was to sell at five per cent below the major companies' prices (R. 1469). However, when the price was forced down to where Ohio was having to sell for $1.79 per roll in the winter of 1957-1958, they pulled out of the whole area and stopped selling in Tennessee (R. 1476). This price was below their cost of production and delivery (R. 1476-78).

D. Cost of Production of Asphalt Saturated Felt.

During the year 1958, it cost the defendant, at Brookville, Indiana, the plant supplying Knoxville, between $1.879 and $2.207 per roll to produce asphalt saturated felt and ship it to Knox County, Tennessee (R. 480-484; Ex. 233, R. 1363, 2409; Ex. 235, R. 1363, 2411; Ex. 236, R. 1369, 2412). Even assuming the lowest estimated cost, Fry was selling below cost in Knoxville continuously after October 3, 1957. (See Chart, supra, p. 25.)

It cost plaintiff, Volasco, $1.75 per roll just to manufacture felt at its Knoxville plant (R. 486). Mr. Jackson of Ohio Paper Company estimated that it cost his company $1.57 per roll to produce asphalt felt and 27¢ per roll to deliver it to Knoxville (R. 1477-78).

E. Petitioners' Damages.

During Volasco's first full year of sales of saturated felt, its sales grew very rapidly (R. 500-507; Ex. 163, R. 540, 2330; Ex. 164, R. 542, 2331). When prices were rather drastically reduced by the defendant in plaintiff's market

area beginning in the spring of 1957, plaintiff instructed its salesman not to push for sales at a great distance from the plant but to concentrate on customers in the vicinity of Knoxville (R. 507, 633-4). Plaintiff's sales began dropping off substantially at this time (Ex. 163, R. 540, 2330; Ex. 164, R. 542, 2331) until the spring of 1958 when defendant reduced its price on felt in Tennessee to $1.54 a roll, and at this time plaintiff withdrew its salesman from the territory and instructed him only to take repeat orders from regular customers and not to attempt to make any new sales as the price was below plaintiff's cost of production (R. 486, 514). Prior to 1954, Mr. George Krug had learned that apparently the cheapest price in the Knoxville area for asphalt saturated felt had been $2.00 per roll during the winter or slow season (R. 757, 787, 1250).

Mr. Krug testified that Volasco suffered losses by reason of the pricing policies of defendant above described (R. 513-15, 896-99); that, based upon the potential market and upon Volasco's own sales records in the period before prices got so low, but for the actions of the defendant; plaintiff would have sold 115,000 rolls of asphalt saturated felt in the fiscal year ending April 30, 1957, whereas it actually sold 78,914 rolls and that it would have sold 195,000 rolls of felt and 87,000 drums of asphalt in the year ending April 30, 1958, whereas it actually sold 61,271 rolls of felt and 59,430 drums of asphalt in this period (R. 1087-92, 1179, 1235; Ex. 195, R. 1094, 2371; Ex. 196, R. 1094, 2372; Ex. 197, R. 1092, 2373). That based upon such projected sales, plaintiff would have earned a net income before taxes of $40,528.00 in the year 1957 and $96,941.00 in the year 1958, whereas it actually earned only $12,330.00 and $4,483.00 in these respective years and, therefore, suffered a net loss of profits of $121,056.00 (R. 1306-14; Ex. 226, R. 1325, 2401; Ex. 227, R. 1325, 2402; Ex. 228, R. 1325, 2403). In addition, Mr. Krug calculated

that the difference between the actual investment in plaintiff's business as shown by its books and its actual value as of the date of filing suit was $39,901.00. He testified that the actual investment was $188,741.00 and the actual value, $148,840.00 (R. 1081-84; Ex. 194, R. 1084, 2370). This reduction in value was due to low earnings caused by defendant's pricing policies (R. 513-15, 1082).

The reasonableness of Mr. Krug's projection as to volume of sales was corroborated by the witness, Bye, an accountant trained and experienced in the making of financial and sales forecasts for businesses (R. 1344, 1386-1390). Mr. Bye was Assistant Manager, Special Services Division of Ernst & Ernst, a large national accounting firm (R. 1342). Working under him in collecting information for him were engineers, marketing specialists and other skilled personnel (R. 1341).

Mr. Krug further testified that based upon projected sales of Volasco Products Company for the two years ending April 17, 1958 (the date suit was filed), had it not been injured by the antitrust violations of defendant, the total loss of profit to Volunteer Asphalt Company amounted to $8,202.22 (R. 1573). The loss of value to Volunteer's business as of April 17, 1958, amounted to $70,000.00 (R. 1573).

F. Petitioners Offered Testimony as to Loss of Profits Based Upon Their Being Deprived of Two Mature Years of Operation Out of Their Total Corporate Lives, and Based Upon Their Being Prevented From Manufacturing a Complete Line of Roofing Products, and Also Injury to Their Business or Property Based Upon Its Value as a Going Concern Had it Not Been Injured by Defendant's Violations.

The site of petitioners' plants on Fort Loudon Lake was selected so that asphalt, which is the principal raw mate-

rial in the products to be processed and manufactured by petitioners, could be shipped by river barge (R. 74). The actual river frontage portion of the site selected was owned by the Southern Railway which leased it to the plaintiff for a fifty-year term (R. 901). The remainder of the land involved was purchased outright (R. 901). During the summer of 1955, Volasco Products Company erected a factory building large enough to house a roofing operation, bought and installed an asphalt felt saturator which could be expanded into a complete asphalt roofing machine by the addition of certain units of machinery (R. 103, 139-40, 508, 1018-19, 1156). It was the intention of Volasco Products Company to install the additions to its felt saturator required to make roll roofing and asphalt shingles shortly after the saturator was installed during the winter of 1955 and 1956 (R. 132, 139-40, 512). However, due to the pricing policies of the defendant and other major manufacturers of asphalt roofing products, plaintiff was delayed in the installation of the additional machinery and entering into the manufacture of roll roofing and shingles (R. 512).

During the trial of the case, plaintiff offered evidence as to the damage suffered by it by reason of the violation by the defendant of the antitrust laws as follows:

(1) That plaintiff, because the key or river front portion of the property on which it operated was occupied only under a fifty-year lease, had a limited existence of not more than fifty years (R. 901); that the actions of the defendant in violation of the antitrust laws during the early stages of plaintiff's development delayed plaintiff's reaching its full development and maturity for two and one-half years as of the date suit was filed (R. 902); that plaintiff, therefore, actually lost two and one-half years of its mature income rather than the income it would have earned during the formative years (R.

902); that its estimated income during a mature year of its existence would be $131,893.00 per year on felt (R. 972), $25,053.00 on asphalt (R. 974), and $7,014.00 on coatings (R. 980), a total projected income for a mature year of $163,960.00 or $409,900.00 for two and one-half years (R. 981); (this evidence omits projected income from the sale of roll roofing and shingles). The Court refused to admit any testimony as to projected income on the mature year theory to determine damages due to loss of profits (R. 961, 996-7, 1006; 1065) and limited plaintiff to proof of what it estimated it would have actually earned between the date it was first injured and the date of filing of the lawsuit, its growth period (R. 962, 974-78, 1006, 1065). Such estimated earnings amounted to only $137,469.00 (Ex. 228, R. 1325, 2403).

(2) That plaintiff and its organizers clearly had the intention from the beginning to enter upon the manufacture of a complete line of asphalt roofing products including asphalt saturated felt, roll roofing and shingles (R. 77, 132, 139, 512), that all it needed to enter into the manufacture of roll roofing and shingles was the addition of certain items of machinery to its existing plant (R. 508-10), which additional items of machinery would cost sixty thousand dollars or less to install (R. 510); that as of April 30, 1956, the combined assets of Volunteer Asphalt Company and Volasco Products Company was over $400,000 and as of the date of trial the amount was around $700,000 (R. 511; Ex. 160, R. 535, 2327); that Volasco was in a position financially at all times between the Fall of 1955 and April 17, 1958 (the date of filing suit) to complete the roofing plant (R. 568); that the acts of the defendant delayed plaintiff in carrying out its program for the manufacture of a complete line of roofing products approximately two and one-half years as of the date of filing the suit (R. 562, 569, 902); that by being deprived of the opportunity to manufacture and sell a complete line

of asphalt roofing products, the plaintiff as of the date of filing suit suffered a total loss of profits of $769,034.00 (R. 572). The Court refused to allow plaintiff to present this testimony as to damages to the jury and it was placed in the record in the absence of the jury (R. 563-572).

(3) That plaintiff, Volasco Products Company, but for the wrongful acts of the defendant would have earned $140,652.00[6] during the period prior to the date of filing suit, that is April 17, 1958 (R. 1107; Ex. 198, R. 1107, 2374); that based upon such an earnings record, future growth, and other economic considerations, the value of plaintiff's business as a going concern would have been about $500,000.00 (R. 1572); that based on plaintiff's actual earnings record during this period of time and considering the effect on it of the wrongful actions of the defendant, the actual value of plaintiff's business as of said date was $52,500.00 (R. 1572) or a difference of $447,500.00. The Court refused to permit this evidence as to difference in value to go to the jury, but limited plaintiff in the proof of damage to its business to evidence of the difference between the actual investment in the business as shown by its records and the actual value of the business as of the date of filing suit. This was a difference of only $39,901.13 (R. 1084, 1101; Ex. 194, R. 1084, 2370).

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[6] This amount was later corrected to $137,469.00 (Ex. 228, R. 1325, 2403). Plaintiff did not offer evidence as to damage to its business based upon the full line of products for the reason that the Court had already excluded that evidence, and it was felt that this issue could be preserved for the Appellate Court's consideration by offering evidence based upon the loss of profits which the Court did admit.

REASONS FOR GRANTING THE WRIT.

I.

PRELIMINARY STATEMENT.

A principal purpose of the treble damage provision of the Antitrust laws (15 U. S. C. 15) was to encourage private litigants to file suits against violators, thus supplying "an ancillary force of private investigators to supplement the Department of Justice in law enforcement", **Weinberg v. Sinclair Refining Co.**, 48 F. Supp. 203, 205 (E. D. N. Y. 1942); and, "multiplying the agencies which would help enforce the Act", **Maltz v. Sax**, 134 F. 2d 2 (7th Cir. 1943). As stated by this Court, there is a "public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action", **Lawlor v. National Screen Service Corporation**, 349 U. S. 322, 329 (1926).

The preparation of this case for trial consumed two years and seven months after the Complaint was filed (See Docket entries, R. 2-19). The trial itself required 36 calendar days and 24 trial days (R. 51, 2244), resulting in a trial transcript in excess of 4000 pages and a joint appendix in the Court of Appeals consisting of 2538 printed pages. We suggest that the Court will judicially know that the preparation and trial of such a case is expensive and burdensome, especially for a small business concern. To say the least, the Opinion of the Court of Appeals in this cause conflicting as it does with the holdings of other Circuits and of this Court, particularly as it relates to proof of damages, far from furthering the stated purpose of the treble damage provision of the Antitrust laws, is most discouraging to these plaintiffs, and, if permitted to stand, we submit its effect as a prec-

cdent would practically put an end to the bringing of treble damage actions. The rulings of the lower Court relating to proof of loss of profits and injury to business are so restrictive that a plaintiff would have little hope of proving damages, and without this incentive, suits would not be filed. Small business, the usual target of antitrust violations, cannot afford the luxury of moral victories.

II.

DAMAGES.

A. Plaintiffs' proof as presented to the jury was clearly competent.

(1) In presenting its evidence as to damages from loss of profits, Volasco offered testimony of its president, testifying from his knowledge, as an expert accountant, and from its own records as to its normal increase when free from defendant's unlawful interference, and testimony of an expert accountant and business advisor as to its projected or expected volume of sales, and in doing so plaintiff sought to and did follow the precedents laid down by this Court in the Eastman Kodak, Bigelow, and Story Parchment cases and of the other Circuits in the Rankin, Twentieth-Century Fox and Atlas Building Products cases.

In concluding its discussion of the plaintiffs' proof as to its loss of profits, the Court of Appeals made this rather anomalous and conflicting statement: "We believe that here the plaintiff, in an effort to be specific has indulged in theories that result in proof that is speculative, remote and uncertain." Then, the Court cites as authority for its conclusion, **Bigelow v. R. K. O. Radio Pictures,** 327 U. S. 251; **Story Parchment Co. v. Paterson Co.,** 282 U. S. 555; and **Eastman Kodak Co. v. Southern Photo Co.,** 273

U. S. 359. Far from supporting the Appellate Court's conclusion as to plaintiffs' evidence, we submit that these cases are the leading cases supporting plaintiffs' theory as to the admissibility of its testimony.

The Court's characterization of plaintiff's evidence as above stated is not an accurate description of it. A reading of all of plaintiff's evidence on damages shows that the figures finally arrived at were in reality judgment figures after considering all available information. In the witness's opinion, they were reasonable in that they were lower than those arrived at by some methods of determination and they were higher than others.

Mr. George Krug, a certified public accountant by profession, who had been actively engaged in this profession prior to his coming to Knoxville, and who was likewise qualified to make and experienced in the making of business forecasts, that is, the projecting of future sales and profits for business organizations based upon market studies and the experience of the particular business (R. 59-60, 63, 135), clearly qualified as an expert witness (R. 56-68, 576-94). Testifying not only in his capacity as an expert in these matters, but also based upon his personal experience in the asphalt roofing industry and his knowledge of Volasco's business, he testified substantially as follows:

Preliminary studies made prior to their decision to enter into the asphalt roofing business and selection of Knoxville as a site, including consideration of the location of competing plants (R. 70, 141-5, 601-11, 615), consideration of the nature of the product, that is, its heavy weight as compared to value (R. 70, 71), the nature of the product itself, and the simplicity of the manufacturing process (R. 136-7), the advantage which a local plant would have from the standpoint of delivery and service to customers

(R. 625) and the potential market (R. 72, 73), indicated that they could reasonably expect sufficient market to support this type of business (R. 71, 131-33; Ex. 25, R. 438, 2287-88). It was based upon these preliminary studies and after consultations with experts in the industry (R. 69, 70, 598-600), that the enterprise was undertaken.

The organizers then prepared forecasts of income similar to those prepared for use in their proof of loss of profits in this suit, and such statements were the basis for the stockholders making their investment in this enterprise, securing bank financing, and proceeding with their plans to locate an asphalt roofing manufacturing plant in Knoxville (R. 134, 137, 138; Ex. 25, R. 138, 2287-88).

Mr. Krug further testified that in his opinion a business such as this should under normal conditions be expected to develop to its normal operating level or maturity in five or six years (R. 904). By the time suit was filed, the company had had more than three years of experience in the production of mopping asphalt and more than two years in the production and sale of asphalt saturated felt (R. 89, 158; Ex. 163, R. 540, 2330). Therefore, based on the company's own records and experience during the early time of its existence and prior to the time that prices of asphalt felt were forced to below cost in the Knoxville area, Mr. Krug projected the sales of asphalt felt by two different methods. In the first place, he projected these sales based on actual sales of felt during the period from October, 1955, to April, 1957 (the period before price competition became so severe), and found that on this sales curve the company should reach a volume of 270,000 rolls per year after 5 or 6 years (R. 904; Ex. 184, R. 907, 2349). His company had more years of experience in the sale of mopping asphalt, and he found from the sales records that sales of this product had increased during the second full year of operation over the first by some 247

per cent. Since the company had begun sale of this product in 1954, he had two full years of sales experience with it prior to the time the price war became so severe. By applying the same percentage of growth to asphalt felt as his experience had shown the company was able to achieve in mopping asphalt, he found that the sales curve for asphalt felt indicated total sales of 295,000 rolls by the end of the fifth year of operation (R. 905-954; Ex. 184, R. 907, 2349). Both these methods of projecting sales resulted in total sales figures that tied in very closely with a projection based upon the United States Commerce Department Facts for Industry figures on total sales of felt as applied to the population of the area within a 200-mile radius of Knoxville, assuming that plaintiff could reasonably expect to eventually obtain approximately 20 per cent of the volume within that area. This method of determination indicated a total potential of 320,000 rolls per year (R. 907-908, 942-44). By the second method of projecting sales, that is, by applying the same ratio of increase to felt as experience had shown the company was able to produce in mopping asphalt, Mr. Krug estimated that Volasco would have sold 120,000 rolls of felt during the year ending April, 1957 (R. 1089).

To further corroborate this estimate, the witness made a study of Volasco's sales records and determined that during the first twelve months of sales of felt, October 1955 through September 1956, such sales averaged 822 rolls per customer (R. 501-504, 1090). Applying this average to the average number of accounts which Volasco sold during the year ending April 1957 would indicate total sales of 115,000 rolls of felt for that year (R. 1090). Defendant's price cutting in the Knoxville area began in earnest with the 7½ per cent special discount on non-perforated felt in August 1956 (R. 210-12, 1090) so that Volasco's sales were affected for about half the 1957 fiscal year.

These two methods of projecting sales for the year ending April 1957 having come out as close to each other, Mr. Krug felt justified in testifying that but for defendant's illegal pricing, Volasco would have sold 115,000 rolls of felt in fiscal year 1957 (R. 1091-92).

As shown by Exhibit 164 (R. 542, 2331), the rate of growth of the sales of mopping asphalt dropped off drastically when the sale of saturated felt began its sharp decline during the year 1957. Having found from a study of his customers' accounts that there was a definite correlation between the sale of mopping asphalt and saturated felt (R. 1090), Mr. Krug testified that in his opinion the loss in sales of asphalt felt reduced his sales of mopping asphalt during the year ending April 1958, and that had the sale of saturated felt continued as projected in accordance with Exhibit 197 (R. 1092, 2373), that the sale of mopping asphalt also would have continued along the same curve on which it had started (R. 1091-2; Ex. 197, R. 1092, 2373). In his conclusion that sales of saturated felt and mopping asphalt go together, Mr. Krug is substantiated by two of defendant's own witnesses (R. 1629, 1694).

Plaintiff did not begin the manufacture and sale of roof coatings until during the year ending April 30, 1957, and he used the actual sales of this product for the 1957 projection (R. 1104). Therefore, in projecting the sale of roof coating for the second year, the witness applied the same growth rate as was developed in the sale of asphalt to the actual sales figures for the year 1957 (R. 1105). This is not a large item, however (Ex. 227, R. 1325, 2402).

Using these projected sales figures, Mr. Krug then applied a reasonable sales price figure to the saturated felt of $2.17 per roll (R. 909, 1094, 1270), and the actual sales price figures to mopping asphalt and coatings to develop

estimated income statements for the years ending in April 1957 and April 1958 (R. 1095, 1104).

(That the average selling price figure used by the witness in determining profits on sale of asphalt saturated felt is a reasonable figure is borne out by the fact that Volasco's average selling price during the year ending April, 1957, even with the price reductions during that year, was $2.13 per roll (R. 1095, 1270-71), and the price in Chicago during all the period was never lower than $2.16 per roll and during most of the period was $2.28 per roll—that is, before defendant's secret year-end rebate and even with this rebate, it was below $2.17 only three months. See Chart on page 25, supra, and see R. 1207-9.)

Mr. Krug's testimony was corroborated by that of Mr. Sam Bye, a certified public accountant with the national firm of Ernst & Ernst of Cleveland, Ohio, who likewise qualified as an expert accountant experienced in the making of forecasts as to future sales and profits for business (R. 1340-44). Mr. Bye approached the problem from a different viewpoint, that is, by a study of a comparable plant and market area to that of Volasco. The one selected by him as being most comparable was that of Fry at Moorehead City, North Carolina (R. 1379-85). From his studies he also reached the conclusion that Volasco could reasonably expect to achieve a sales volume of 300,000 rolls of felt per year (R. 1386). Defendant's counsel conducted exhaustive cross-examination of both of these witnesses, Krug and Bye, on every phase of their testimony and was unable to discredit their conclusions in any way, although counsel had the services of Fry's own certified public accountant to advise and counsel with him during the trial (R. 464, 551-52, 1339-40). For example, on cross-examination of Mr. Krug, counsel sought to discredit his forecast of future sales by attempting to prepare his own forecast of Volasco's potential sales based on

Volasco's actual sales records (R. 1246-1247). The witness promptly pointed out that counsel's chart was inaccurate, however, because it developed projected sales for the year ending April 1957 of 20,000 rolls less than Volasco's actual sales, whereupon counsel promptly dropped that subject (R. 1247-1249). If plaintiff's projections and calculations were so speculative, remote and uncertain as the Appellate Court has indicated, we wonder why the defendant was unable by cross-examination to refute them and why defendant did not produce its own accountant or some other expert witness to explain the fallacies to the jury.

The testimony offered by plaintiff was directly in line with that held by the Court of Appeals of the Second Circuit to be admissible in the case of **William H. Rankin Co. v. Associated Bill Posters of United States and Canada, et al.**, 42 F. 2d 152 (2d Cir. 1930), as indicated by the following quotation from that Opinion at page 155:

> "In its proof of damages, Rankin was permitted, under objection and exception, to show by the testimony of its treasurer and by a compilation he had made, based on the net profits of the business in 1911 and from his knowledge of business conditions when free of the defendants' unlawful interference, what he considered would have been the normal increase of this plaintiff's business from year to year. He was permitted to estimate on this basis its probable yearly earnings from July, 1913, to June 30, 1918, and to explain how his figures were arrived at. The fact that this amount of the plaintiff's damages could not be expressed in exact figures did not make them speculative. There was no speculation as to the fact of actual damage. Its business had been seriously curtailed. The defendants had caused the damage, and cannot be permitted to escape liability because it is difficult for the plaintiff to express in terms of dol-

lars the damages it has suffered. This evidence, while purely an estimate and introduced as such, was proof of a kind as definite and certain as the subject-matter admitted. It had to do with what was never actually earned because of the defendants' wrongdoing. The witness testified from his knowledge of the business history, made his calculations upon what appears to be a reasonable basis, and the defendants had ample opportunity by cross-examination or the offer of their own evidence on the subject to discredit him and show any fallacy in his reasoning or testimony. Whatever may be said of its weight, and that was entirely for the jury, we have no difficulty with its admissibility. Eastman Kodak Co. v. Southern Photo Material Co., supra, at page 379 of 273 U. S., 47 S. Ct. 400."

The holding of the Sixth Circuit in the instant case is clearly in conflict with that of the Second Circuit in the **Rankin** case.

In answer to a question by the Trial Court as to whether his forecasts were a guess, Mr. Krug said:

"No, our answer is based on these forecasts on our own experience. Had we not been undercut in price, we would have had more experience to prove these forecasts. That is, the basis of our figures, our own experience here, our forecast" (R. 957).

Plaintiff's testimony was also clearly admissible and submissible to the Jury under the holdings of this Honorable Court.

"Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate".

Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359, 379 (1927).

"'Juries are allowed to act upon probable and inferential, as well as direct and positive proof. And when from the nature of the case the amount of the damages cannot be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the Jury all the facts and circumstances of the case having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit.'

* * * * * * *

"And the adoption of any arbitrary rule in such a case which will relieve the wrongdoer from any part of the damages, and throw the loss upon the injured party, would be little less than legalized robbery."

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555, 564 and 565 (1931).

"'The constant tendency of the Courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery for a proven invasion of the plaintiff's rights.'"

Bigelow v. R. K. O. Radio Pictures, Inc., 327 U. S. 251, 265-266 (1946).

In holding that plaintiffs' proof as to loss of profits was improper, the Appellate Court clearly invaded the province of the Jury in attemtping to weigh such evidence. The Court seemed to conclude that the testimony was improbable because the Court did not agree with the witnesses that a fair basis for projecting the sales of felt was by using Volasco's actual experience in the sale of mopping asphalt. In this connection, the Court stated, "There is no evidence to support the claim that there is a general overall pattern that mopping asphalt and felt move in any

particular relation to each other" (A. 11). In this conclusion we respectfully beg to differ with the Court of Appeals and submit that there was ample evidence from which the Jury could find that plaintiff's witnesses were warranted in concluding that sales of mopping asphalt and felt do move in a relation to each other.

In discussing the chart showing the sales curve of asphalt felt, asphalt and roof coating (Ex. 164, R. 542, 2331), Mr. Krug testified: "The asphalt and felt are normally sold together and the decline in the felt would naturally affect the sales curve of the asphalt" (R. 546).

He further testified: "Every time the price was reduced below the price we were selling we were injured to the extent we would have to reduce our price to remain competitive so all that we have sold at the lower price we lost the difference between the previous price and the new price. Also, as many of these discounts and undercutting in price came without our knowledge, frequently business was lost completely of the customer being offered a better price than our then current price, that he might and did place the business with another supplier, so we lost some business altogether. And, of course, the third thing that resulted from both, and primarily the second set of sales where we did not sell at all, our other products suffered because normally they are sold with the felt. So if a man placed his felt business with another supplier he would be very apt to also purchase his coatings and his asphalt from the other supplier" (R. 513-514).

Later, he testified: "The mopping asphalt shown on Exhibit 184 showed a very drastic flattening out of its growth curve, at the same time the felt sales started declining.

"As we know, the sales of these two products go together. The decline in the felt sales would adversely affect the sale of the mopping asphalt" (R. 1091).

Finally he stated:

"Q. Now you have testified that there is, in your opinion, a relationship between the sales of asphalt and felt. I will ask you whether or not you have made any studies other than those indicated on the chart, Exhibit 197, to reach that conclusion?

"A. Yes, I believe I mentioned the—that wouldn't be a relationship. We made a study of a broad section of our accounts to determine on the average how much felt is sold with asphalt.

"That study indicated that approximately two and one-quarter rolls of asphalt—of felt is sold per roll[7] of asphalt" (R. 1317, 1318).

As further showing that Mr. Krug's testimony was not simply an assumption of his part, Mr. Joseph Madler, a witness for the defendant, testified on direct examination:

"Q. Do you sell both asphalt saturated felt and asphalt?

"A. As a part of the roofing line, yes.

"Q. Do all of the people who buy your felt from you also buy asphalt from you.

"A. I would say yes" (R. 1629).

Also, the witness, R. L. Steele, a witness on behalf of the defendant, testified on cross-examination:

"Q. Mr. Steele, from your experience as a purchasing agent, is there any advantage in a manufacturer having a complete line of asphalt roofing products as against having only one product such as asphalt saturated felt to offer for sale to its customers? You may answer.

"A. Yes, sir. The manufacturer does have an advantage in having a complete line of roofing products

[7] This should read "per *drum* of asphalt."

as does any manufacturer who has a complete line, over one who has specialty items.

"Q. What is the basis for your statement? Why do you say that?

"A. Each item will tend to sell the other one in relationship to the product" (R. 1694).

All of this testimony is further corroborated by the fact that asphalt felt and mopping asphalt are the two ingredients, and therefore used together in the construction of built-up roofs (R. 645, 1447, 1935).

Further, in holding that in the two years succeeding the material period, that is, the years 1959 and 1960, the fact that asphalt saturated felt decreased in each of those years while the sale of asphalt increased refuted Mr. Krug's claim that sales of asphalt and saturated felt moved in relation to each other, the Court was clearly guilty of usurping the functions of the jury in construing, weighing and analyzing the testimony. Mr. Krug had very clearly testified, and his entire testimony shows, that the price of mopping asphalt did not substantially decrease, whereas the price of asphalt saturated felt did decrease below cost, and that, for this reason, he instructed his salesman not to try to sell asphalt saturated felt, but merely to accept orders for this product from old, established customers in order to keep the business (R. 507, 514, 633-4). He further testified, and the exhibits (Ex. 184, R. 2349; Ex. 164, R. 2331) clearly and dramatically show, that on the same date that sales of asphalt saturated felt started their precipitous decline, the increase of sales in mopping asphalt likewise abruptly stopped, and sales of this product leveled off (R. 953). Then, too, the fact that mopping asphalt is used for some purposes other than in built-up roofs would tend to keep sales of that product up (R. 1284, 1935). There is no question on this record, however, but that if Volasco's sales of felt had held up the

sales of asphalt would have increased substantially more than they did.

In analyzing the testimony of Mr. Sam Bye, the expert witness on behalf of plaintiffs, the Appellate Court shows that it did not fully understand the testimony but jumped to conclusions without taking into account all of the evidence. The Court quoted Mr. Bye's testimony to the effect that in his opinion it was reasonable to assume that Volasco could have reached a volume of 195,000 rolls of felt by the end of April, 1958. The Court then says: "How he arrived at this figure is unexplained. He applied no mathematical formula. It appears to be a figure arbitrarily taken out of thin air" (A. 12). In this statement the Court was in error. This witness had already testified as to market studies which he had made (R. 1378-1384) as to a comparison between the market area served by defendant's plant at Moorehead City, North Carolina, with that served by plaintiff's plant (R. 1382, 1385) as to a study of the volume of sales of asphalt saturated felt at defendant's Moorehead City plant (R. 1385), and that, based upon such studies, in his opinion, "It would be entirely reasonable that Volasco would have a potential of up to, say, approximately 300,000 or more rolls of felt per year (R. 1386, 1393). That, based upon this potential and based upon Volasco's experience and record in the sale of mopping asphalt, it had a second year potential (that is, the year ending April, 1958) of 194,989 rolls of felt (78,914 rolls of felt multiplied by 147%—see R. 90 and Ex. 163; R. 2330) as compared with Mr. Krug's estimate of 195,000 rolls (R. 1387-1390). Thus the figure of 195,000 rolls as testified to by Mr. Bye was clearly a judgment figure based upon all the factors above set out and not picked out of the air; Mr. Bye **did** apply a mathematical formula in verifying his judgment.

The Appellate Court, we further submit, unfairly and improperly assessed the testimony of Mr. Bye when on

page 13 of its Opinion it stated that his estimate was conditioned upon Volasco having an aggressive sales organization and giving good service without his knowing anything about Volasco's organization or ability to give service (A. 13). And in saying that "one cannot say Moorehead City shipped over 300,000 rolls in a year, therefore Volasco in another area even though essentially similar could ship a similar number of rolls." In the first place, the witness's testimony is much more detailed, backed up by studies covering population in the area, residential units and commercial industrial buildup in relation to felt sales, and the final conclusion by this expert witness that in his opinion the market for the product was very comparable, particularly in view of the fact that a substantial part of it overlapped (R. 1379-1386). In making his estimate as to the potential sales of the company during the second year, the witness very clearly conditioned that estimate upon the company having an aggressive sales program supported by advertising and giving good service to its customers in the area (R. 1393). There was other evidence in the record from Mr. Krug and others as to the actual sales policies of the company and its sales efforts (R. 495-508). The vicious nature of the price cutting on felt in the Knoxville area is itself testimony to the effectiveness of plaintiff's sales efforts. If the jury from this evidence found that Volasco did have aggressive sales policies and gave good service, then it was entitled to consider the testimony of Mr. Bye as to its potential sales for the fiscal year ending in April of 1958. In overruling numerous objections to the testimony of this witness, the Trial Court carefully pointed out on more than one occasion that the objection went to the weight of the testimony rather than to the competency (R. 1382, 1385, 1391). It was not error for the Trial Court to admit the testimony into evidence for "all the facts and circumstances of the case having any tendency to

show damages or their probable amount should be submitted to the jury to permit it to make the most intelligible and probable estimate which the nature of the case will permit.". **Story Parchment Co. v. Paterson Parchment Paper Co.**, 282 U. S. 555, 564.

Wherefore, it is respectfully submitted that the Appellate Court, in holding that plaintiff's testimony as to damages was insufficient as a matter of law, in effect denied plaintiff a trial by Jury in violation of the Seventh Amendment to the Constitution of the United States and disregarded the mandates of this Court in the **Bigelow**, **Story Parchment** and **Eastman Kodak** cases and attempts to set up a rule for proof of damages in conflict with that of other circuits, particularly the Second Circuit in the case of **Rankin v. Associated Bill Posters**, 42 F. 2d 152, the Eighth Circuit in the case of **20th Century-Fox Film Corp. v. Brookside Theatre Corp.**, 194 F. 2d 846, **cert. denied** 343 U. S. 942 (1952), and the Tenth Circuit in the case of **Atlas Building Products Co. v. Diamond Block and Gravel Co.**, 269 F. 2d 950, **cert. denied** 363 U. S. 843 (1960).

(2) In addition to loss of anticipated profits, plaintiff was entitled to recover for injury to its business, or depreciation in the value of its property, and the Sixth Circuit's holding that this element of damages was duplicatous is in conflict with the decision of this Court in the Story Parchment case and with the Tenth Circuit in the Atlas Building Products case.

The Sixth Circuit in holding that plaintiff was not entitled to recover for injury to its business as well as loss of profits is holding directly contrary to the holding of this Court in the case of **Story Parchment Co. v. Paterson Parchment Paper Company**, 282 U. S. 555, and directly contrary to the holding of the Tenth Circuit in the case of **Atlas Building Products Co. v. Diamond Block & Gravel Co.**, 269 F. 2d 950. The Sixth Circuit does cite these cases

and purports to distinguish them from the instant case. We submit, however, that the distinctions relied upon by the Court are purely imaginary and not real. It seeks to distinguish the **Story Parchment** case by saying that in that case the plaintiff was forced out of business. It is respectfully submitted that there is no difference in law nor in fact as to whether the plaintiff closes its business or continues to operate on a limited and curtailed basis as did Volasco. There is no question but that the assets of Volasco were worth some $39,000.00 less on April 17, 1958, than had been invested in that company. This was the testimony, and there was no contradictory testimony. The Jury was entitled to consider it in arriving at its verdict. The Appellate Court in holding this evidence incompetent is usurping the function of the jury and denying plaintiff a Jury Trial in violation of the Seventh Amendment to the Constitution of the United States. In stating that plaintiff, by receiving damages for profits and an injunction to prevent further illegal pricing, is made whole is a fallacious assumption on the part of the Court. An award of damages in an antitrust case is no substitute for actual earned profit. A business operating profitably as a going concern has its organization for production and sales developed, it has good will and customer relations established and it has credit standing based on its history of earnings. A business debilitated by antitrust injury, even after an award for its lost profits, is still debilitated, with demoralized sales and production organizations, no established good will and no record of earnings.

Suppose plaintiff had been operating a dairy, and defendant set about administering a slow poison to plaintiff's dairy cows which caused them to stop producing milk. Should it be said in such a case if plaintiff recovered of the defendant its loss of profits because of the reduced production of milk and at the same time secured an

injunction against the defendant from continuing its administration of poison to the cattle that plaintiff could not, also, recover the damage to the cattle, that is, the difference between their value as milk producers and their actual value as of the date of injury merely because the Court might say that since defendant is now enjoined, you can get busy and doctor your cattle and restore them to health and to future production.

While it is true in the **Story Parchment** case that defendant had closed its business, yet it is also true that the only difference between the damages in such a case and in the case at bar is a difference in degree, and this Court in its Opinion allowing damages for injuries to plaintiff's business relied not one whit upon the fact that plaintiff had closed its business.

In attempting to distinguish its holding in this case from the holding of the Tenth Circuit in the **Atlas Building Products** case, the Sixth Circuit merely stated, "but there is no indication that they overlapped as they do here" (A. 17a). We submit that a reading of the Opinion in the **Atlas Building Products** case reveals that the situation of the plaintiff in that case is identical with that of the plaintiff in this case. In that case, plaintiff's proof of damages followed the identical theory that plaintiff in the instant case followed. In discussing the two elements of damages the Tenth Circuit said:

> "In that regard the jury was instructed that in determining damages it might consider as one of the elements, any profits that may have been lost by appellee in its business; and that it might also consider as another element of damages the extent to which the value of appellee's profit or the net worth of its assets had been diminished as a result of the price discrimination. The appellant objected to this instruction on the ground that it permitted the jury to assess double damages for one wrongful act.

"The statute speaks of injury to 'business or property'. And see Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. A., § 15. And, those words in their ordinary sense have been construed in terms of (1) the difference, if any, between the amounts actually realized by the injured party and what it would have reasonably expected to realize from sales but for the unlawful acts complained of; and (2) the extent to which the value of the petitioner's property had been diminished as a result of such acts. See Story Parchment Co. v. Paterson, supra; Kobe, Inc. v. Dempsey Pump Co., supra; Bigelow v. R. K. O. Pictures, supra. We think both loss of profits in business and diminishment of the assets were proper elements of damage, and the trial court did not err in so submitting the case to the jury" (pp. 958-959).

It is respectfully submitted that the Opinion of the Sixth Circuit is not only in direct conflict with the decision of the Court of Appeals of the Tenth Circuit but is also in direct conflict with the applicable decisions of this Court, and, for these reasons, this Court should exercise its power of supervision by granting certiorari in this cause.

(3) **Defendant's illegal pricing practices as to plaintiff's principal product adversely affected sales of other products, mopping asphalt and roof coatings, manufactured by plaintiff and it should be allowed to recover the losses thus caused.**

In holding that plaintiff was not entitled to recover for loss of profits due to decreased sales of mopping asphalt and roof coating, the Court based its decision on the ground that the prices of these products were not involved in the price manipulation on felt sales and, "The evidence does not support Mr. Krug's statement that sales of these products decreased **proportionately** with the sales of felt"

(Opinion, 13). We are not aware that Mr. Krug ever made the statement that the sales of these products decreased proportionately with the sales of felt. His testimony as borne out by the company records and as depicted on the chart, Exhibit 164 (R. 2331) was that the increase in sales of mopping asphalt fell off drastically when the sales of asphalt felt began their precipitous decline.

At one point in his testimony in discussing the chart, he stated:

> "As you see, when the felt actually started declining, the actual asphalt sales leveled off appreciably. Their growth was greatly curtailed from that point on." (R. 953).

He did testify, as hereinabove stated, that in his opinion, and based upon a study of his own company's accounts, there was a pretty definite ratio between the sales of mopping asphalt and of asphalt saturated felt during normal times—that is during the period prior to defendant's illegal price discriminations. Mr. Krug gave very cogent reasons for the sales of mopping asphalt and roof coatings not increasing as they normally should have increased had not the sales of felt been adversely affected, for, as he said, he was unable to keep a salesman on the road with the price of felt being below cost of production and delivery (R. 507, 514, 633-634). The only logical result of such action is reduction in sales of all of plaintiff's products. If plaintiff's salesman is unable to call on customers because he cannot afford to sell the principal product of the company, then he is not soliciting orders for the other products either. Defendant's actions in violation of the antitrust laws, by causing plaintiff to reduce its sales effort, necessarily injured it in the sale of the other products which it manufactured.

That there is a relationship between the sales of asphalt and felt, or that factors affecting the sales of felt also

affect asphalt, we believe is clearly shown by our discussion under the previous section of this argument at pages 42a to 45a.

In holding that "plaintiff was not entitled to recover for loss of sales on mopping asphalt and coatings" (A. 16a-19a), the Appellate Court does violence to the holding of this Court in the cases of **Eastman Kodak Co. v. Southern Photo Materials Co.**, 273 U. S. 359, and **Story Parchment Co. v. Paterson Parchment Paper Co.**, 282 U. S. 555. This Court should grant certiorari and correct the holding of the Sixth Circuit on such an important question of Federal law for the losses thus suffered by plaintiff were clearly **an injury to its business or property by reason of a violation by defendant of the antitrust laws.**

B. Plaintiff should have been permitted to present to the jury evidence as to its loss of profits by being prevented from entering upon the manufacture and sale of shingles and roll roofing, its losses based upon its projected sales during a mature year, and the loss in value of its business as a going concern.

(1) Plaintiff clearly had the intention to go into the business of manufacturing and marketing a full line of asphalt roofing products including shingles and roll roofing and had acquired at least 90 per cent of the plant, machinery and equipment necessary to manufacture shingles and roll roofing but was prevented from making the 10 per cent additional investment in machinery necessary for these products by defendant's illegal pricing practices, so that plaintiff should have been permitted to submit to the jury testimony as to its losses on projected sales of shingles and roll roofing.

The questions here presented are whether the plaintiff intended to go into the business of manufacturing roll

roofing and shingles and whether it was prepared to engage in that business.

On the question of intention, there can be no doubt under this record, Mr. Krug's testimony, that they had the intention from the inception of the business, even prior to organization of the plaintiff corporation (R. 77), is clearly supported by a memorandum dated April 12, 1954, filed as Exhibit 17 and copied in the Record (R. 131-133). They had blueprints prepared of plant layouts including refinery, roofing plant and entire layout (R. 82). Blueprint of proposed roofing machine was filed as Exhibit 22 but is not copied in the joint appendix. Mr. Krug's testimony was further substantiated by a letter which he wrote the Southern Railway Company on June 17, 1954, marked as Exhibit 26 for identification (R. 139), from which it appears that as of that date the completion of the roofing machine by adding the additional elements to manufacture the roll roofing and shingles to the felt saturator was contemplated for the winter of 1954-55 (R. 139).

As to whether it was "prepared" to engage in that business, the evidence shows that as of the end of the fiscal year, April 30, 1956, plaintiff, Volasco Products Company, had total assets prior to depreciation of $165,962.17 (Ex. 158; R. 515, 2325), and Volunteer Asphalt Company had total assets of $275,543.60 (Ex. 159; R. 534, 2326). While as of the date of trial their combined assets were $717,249.49 (Ex. 160; R. 535, 2327). In order to manufacture roll roofing and shingles, it would be necessary for plaintiff to add certain items of equipment and machinery to its existing saturator, and such additional pieces of equipment would cost $60,000.00 or less to install (R. 508-10). Thus, to fully equip itself to manufacture roll roofing and shingles, plaintiff or its promoters would be required to invest approximately 8 per cent to 13 per cent additional capital in the business. The large

investment already made by plaintiff would not have been made had they not intended to manufacture a complete line of roofing materials (R. 1293). They were able financially at all times after the Fall of 1955 to complete the roofing plant (R. 568). They had the land, the dock, the office building, factory building, the asphalt facilities, and the saturating machine already installed and constructed (R. 98-104, 140). All they lacked was the addition of comparatively minor items in order to be fully prepared to manufacture roll roofing and shingles. As to whether a person is prepared to engage in a business is always a question of degree. Suppose everything had been done and all machinery installed, and all that remained to be done was the installation of a switch to turn electric current into the machinery. Under these circumstances, could it be said that plaintiff was not "prepared" to go into the business? Mr. Krug stated their reason for not going into the full line as follows:

> "Q. Then why did you not complete it?
>
> "A. Two reasons, Number one, as soon as we began the manufacture of saturated felt the price cutting commenced, and if that same policy would be applied to the other products which we planned to produce, we would be forced out of business. We would become insolvent, had we attempted to manufacture the complete line.
>
> "We could absorb the losses on the felt, which we have absorbed since 1959 to date, and are still in business and in a position to carry out this suit. We couldn't have done so had we spent the money on the complete roofing machinery and made the complete line of roofing products. The losses on the complete line would have been so tremendous. The felt is approximately 15 per cent of the total roofing market, so the loss on the other 85 per cent would have been tremendous" (R. 568-569).

It should be clearly understood that roll roofing and shingles are merely additional products in the asphalt roofing line to those already in production by the plaintiff, that the basic raw materials with the exception of granules are the same as utilized in the manufacture of asphalt saturated felt, and that the manufacture of these additional items is not a complicated engineering or manufacturing problem to a company already manufacturing saturated felt (R. 91-92, 135-37).

But for the illegal actions of the defendant, plaintiff would have entered into the manufacture of these products (R. 512-13).

> "A person has a legal right to engage in a lawful business. If he is unlawfully excluded from exercising this right, when he is prepared and intends to exercise it, he suffers an injury for which the law awards damages—he is 'injured' within the meaning of the Federal statute."
>
> **Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.**, 166 Fed. 254, 260 (2d Cir. 1908).

See also **Triangle Conduit & Cable Co. v. National Electric Products Corporation**, 152 F. 2d 398, 400 (3rd Cir. 1945); **American Banana Co. v. United Fruit Co.**, 166 Fed. 261, 264 (2d Cir. 1908); **William Goldman Theatres, Inc. v. Loew's, Inc.**, 69 F. Supp. 103 (E. D. Pa., 1946), aff'd 164 F. 2d 1021 (3rd Cir. 1948), cert. den. 334 U. S. 811; and **American Tobacco Growers v. Neal**, 183 F. 2d 869 (4th Cir. 1950).

Petitioner, Volasco, respectfully urges that under the testimony in this case, the questions should have been submitted to the jury under proper instructions as to whether plaintiff had the intention and was prepared to proceed with the manufacture of roll roofing and shingles

and, if so, whether it suffered any damages as a result of Fry's illegal actions in preventing it from entering into this business.

(2) **Defendant's illegal pricing had as of the date of suit delayed plaintiff at least 2 years in reaching full development or maturity; plaintiff, therefore, should have been permitted to present to the jury testimony as to its loss of anticipated profits during two (2) of its mature years, particularly since its total business life was limited to fifty years.**

Mr. George Krug explained this theory very succinctly when he testified as follows:

"Q. You explain to us just how you arrived at it, if you will.

"A. Our company has a lease with Southern Railway for 50 years covering all of the lakefront property. So that——

"By Mr. Wilson:

"Q. Let me interrupt you right there to make clear. What do you mean by the lakefront property? Is that the property your plant is located on?

"A. Part of the plant is located on it, but it is where the docks are located, and we could not receive asphalt by river without the lakefront property, and the cheap transportation of asphalt to the plant is the economic basis for the plant.

"Q. Then there is other property which your company does own outright, is that correct?

"A. That is correct.

"Q. But that property, does it or not have access to the lake?

"A. The property we own does not have access to the lake.

"Q. Except across this Southern Railway property?

"A. That is correct.

"Q. Proceed.

"A. So we regard that as the life of the corporation. Every new company is going to have a growth period, based on our own growth during the relatively limited period that we had experienced before the price war got so severe——

* * * * * * *

"A. Plus the growth, and growth in the asphalt sales which were not so seriously reduced, I believe this type of business would reach its maturity in five to six years. We have spent about that much time up to 1960 in developing the business, but rather than reaching maturity we are back practically where we started in felt. So that if we are successful in this suit, we are going to have to start all over again in building the business so it will be another five years before we reach our maturity.

"In effect then, we are going to have 10 years of our 50 year corporate life taken up by growing pains, rather than the normal five. For that reason, I feel the two and a half years that we have lost between '55 and '58, we have lost it forever as far as our mature earnings are concerned. We will not have that many years left.

"Our projections, therefore, are based on what we feel we would earn when we reach approximately our full growth" (R. 900-902).

Mr. Krug then estimated the loss of income suffered by his company by being deprived of two and one-half years of its mature life at $163,960.00 per year or $409,900.00 (R. 966-981).

As stated by Judge Christiancy in the case of **Allison v. Chandler**, 11 Michigan 542, 550-556, quoted with ap-

proval by this Court, in the case of **Story Parchment Company v. Paterson Parchment Paper Company**, 282 U. S. 555, 564:

> "... we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; ..."

The Appellate Court did hold that Volasco could recover damages suffered after the date of suit proximately caused by wrongful acts of defendant before the complaint was filed (A. 16a-19a). Plaintiff's mature-year concept or theory of damages fits exactly into this category as under it plaintiff is seeking to recover two and one-half lost years of profit of which it was deprived by defendant's violation of the antitrust laws prior to date of suit. See **Lawlor v. Loewe**, 235 U. S. 522, 536 (1915); **20th Century-Fox Film Corp. v. Brookside Theatre Corp.**, 194 F. 2d 846, cert. denied 343 U. S. 942 (8th Cir. 1952).

(3) Plaintiff should not be limited to testimony concerning the difference between the actual investment in its properties and the actual value of such properties in presenting its proof as to the injury to its business or property caused by defendant's actions but should have been permitted to introduce testimony as to the difference between the going concern value its business would have had but for the actions of the defendant and the actual value of such business as of the date of suit.

As an abstract proposition it is clear that plaintiff in an antitrust action should recover in addition to loss of profits which it may be able to show, damages to the extent of the difference between what its business would have been worth had it not been interfered with and its actual value after such interference. In ruling upon plaintiff's evidence as to the extent of damages to its business,

the Court should not have limited the proof to the difference between the actual investment in the company and its actual value after being damaged by antitrust violations. While the actual investment in a company is one of the factors considered in determining the real value of a company, it is not the only one, and, in the business community, it is frequently considered the least important. The proven earnings record of a business property is the most important factor in arriving at its value as businessmen acquire business properties primarily for their future earnings and not to liquidate them. The earnings basis is most frequently used because the actual investment in a property does not always show the real value of a business. The business may have made excellent, good, or bad decisions in building or acquiring its properties so that the real value of these items may be more or less than the actual investment. It likewise may have acquired intangible assets of substantial value which are not reflected on the books as part of the actual investment. Examples of these items would be the development of a competent and successful sales organization, an experienced and efficient manufacturing organization, various products, patents, franchises, etc. As the earnings record of a company reveal how effectively these items are put together in the operation of the business, it more clearly reflects the value of these assets.

In an antitrust action any evidence bearing upon the probable loss in value or loss of value to a business due to actions of defendant in violation of the antitrust law should be submitted to the jury to enable it to reach such reasonable and probable estimate of damages as they think will produce adequate compensation. **Story Parchment Co. v. Paterson Parchment Paper Co.**, 282 U. S. 555, 565.

An evaluation of a business on an earnings basis for determining damages or injuries to a business due to anti

trust violations is not duplicating an award for damages due to loss of profits. A business with a proven record of earnings has a value apart from the earnings themselves, even though such earnings are withdrawn from the business. An award of damages for loss of profits is no substitute for the earnings record itself as such damages would have no meaning to investors who were looking to the future for their earnings and a return of their investment. A business would have to redevelop its sales organization, its customers and suppliers' relationships, its manufacturing and research organization, and again prove its ability to make a profit before the value of its property would be restored.

III.

THE APPELLATE COURT ERRED IN REVERSING THE CASE OF THE MONOPOLY ISSUE.

A. The evidence is sufficient to submit to the jury the issue as to the violation by Fry of Section 2 of the Sherman Act, and the Appellate Court went outside the record to find facts upon which to hold the evidence insufficient.

The Court of Appeals very accurately and very succinctly stated the law of monopolization on page 8 of its Opinion in the following language:

> "Section 2 of the Sherman Act (Section 2, Title 15, U. S. C.) provides that it is a violation of the law for a person to monopolize or to attempt to monopolize, or for a person to combine or conspire with any other persons to monopolize any part of the trade or commerce among the several states.
>
> "The essentials of monopolization are, the power to raise or fix prices, to eliminate competition at will, or to unreasonably restrict competition, and the intent

to exercise that power. United States v. DuPont & Co., 353 U. S. 586, 592; United States v. DuPont & Co., 351 U. S. 377, 389; American Tobacco Co. v. United States, 328 U. S. 781, 811; United States v. Griffith, 334 U. S. 100, 107."

We respectfully submit, however, that the Court failed to apply properly the law as thus enunciated to the evidence in this case.

Defendant is the largest producer of asphalt roofing products in the United States. While agreeing with this statement, the Court of Appeals on page 8 of its Opinion volunteered the further statement, "It was not the largest company manufacturing this product . . ." (A. 19a). This statement of the Court of Appeals is not supported by the record in this case and, for whatever it is worth, apparently was taken from defendant's Brief in the Appellate Court. In its Main Brief, defendant stated on page 15, "While defendant has 19 plants, its net assets are less than $20,000,000.00 (Ex. 130), and it competes with many larger national companies." In its Reply Brief, Volasco pointed out that Exhibit 130 shows total assets of the defendant to be $28,000,000.00 and stated, "while the size of its national competitors does not appear in this record . . .". Faced with a total lack of evidence in the record, defendant was in no wise daunted, and in its Reply Brief stated on page 3, "In any event Fry's competitors include such bigger corporations as Johns-Manville, Celotex, Allied Chemical, Ruberoid, Certain-Teed, Flint-Kote, Philip Carey, U. S. Gypsum, and Bird & Son. Judicial notice of their sizes is appropriate. These are shown in reading financial publications on which the business community relies. While plaintiff claims Fry has $28,240,752.00 total assets, Moody's Industrials (1957) shows that Bird, the smallest of the above named competitors of Fry, has assets amounting to over $40,000,000.00, and Allied Chemi

cal, the largest, has assets of over $750,000,000.00. Six of the nine have more than twice Fry's total assets."

This case was presented to the jury on the evidence produced at the trial. There was no evidence as to the size of Fry's competitors. Without such evidence, it is no more appropriate for the Courts to take "judicial knowledge" of financial statements that may be contained in some financial publication than it would be for this Court to take judicial knowledge of the size of a corner grocery based upon a Dun & Bradstreet report presented for the first time in an appellate brief. The Appellate Court found as a fact that Fry was not the largest company manufacturing asphalt felt although there was **no** evidence before the Trial Court and the jury upon which either of them could have made such a finding. Evidence outside the record to substantiate defendant's position should no more be supplied by the Appellate Court than evidence supporting plaintiff's position. Plaintiff is entitled to have this case considered on the evidence and only on the evidence which was submitted to the jury. Any other rule deprives plaintiff of a trial by jury.

Fry has nineteen roofing plants located strategically throughout the country, being as many plants as its next two largest competitors have combined. Ruberoid Company has eleven plants and Certain-Teed Products Corporation has eight plants (R. 556-58). Defendant sold twelve and one-half per cent of the total national sales of asphalt saturated felt in the year 1958 (R. 157). As of October 31, 1958, defendant had total assets of $28,024,752.00 (Ex. 130). We submit that defendant's size both physically and financially is sufficient to carry with it an opportunity for abuse that is not to be ignored when the opportunity is proven to have been utilized in the past. **United States v. Swift & Company**, 286 U. S. 106, 116 (1932).

Mr. Lloyd A. Fry, Jr., defendant's president, in his letter of April 27, 1956, to Peaslee-Gaulbert stated that

the small roofing manufacturers in the Southwest were a thorn in the side, that defendant was watching them closely, that in due time they would be dealt with and that if they didn't get in line within thirty days, "we will take corrective action." As of June 15, 1956, the corrective action was apparently begun when the price was raised over the country except in the Southwest. Mr. Lloyd A. Fry, Sr., the Chief Executive Officer, Chairman of the Board, and owner of ninety (90) per cent of the total capital stock of defendant (R. 189, 1490, 1916), while negotiating for the purchase of Marvel Roofing Products, Inc., an asphalt roofing business of Albuquerque, New Mexico, in late 1957 or early 1958 (R. 1026-27), indicated that he engaged in the practice of "conditioning the market" by reducing the price of asphalt roofing products in a given area (R. 1028-29). He admitted or bragged that he was responsible for lowering the price of such products in Marvel's territory (R. 1027). The fact that Fry was responsible for the low prices in the Marvel area was confirmed by the witness, Cox (R. 1030, 1040).

Mr. Fry, Jr., defendant's president, visited the plants of The Piedmont Company near Atlanta, and Sunset at Lubbock, Texas, where prices had been lowest, to see about buying them. Failing to buy these plants, defendant is building plants of its own at Lubbock and Atlanta (R. 2059-60).

Of the fourteen price changes between February 1956 and March 1958, defendant alone initiated all but three (R. 2045-46). Five of these price changes represented price increases in the Knoxville area and defendant alone initiated all five of these changes. The price of asphalt saturated felt has remained high throughout the entire period of time in the Chicago area where defendant "competes" with all of the national manufacturers which sell in the Knoxville area; indicating that it is able to control these national concerns (R. 1501-2; Ex. 125, R. 443, 2297).

Defendant has been successful in excluding plaintiff from the manufacture and sale of asphalt shingles in the Knoxville area (R. 512-13), and has greatly reduced its sales of felt in the area served by its plant (R. 514; Ex. 164, R. 542, 2331).

By forcing the price of asphalt saturated felt in the Knoxville area below $1.79 per roll, defendant was successful in eliminating Ohio Paper Company as a competitor in that area (R. 1476).

Thus, we submit that there is more than ample evidence in this record to warrant submission to the jury of the issue as to whether defendant alone had monopolized the sale of asphalt saturated felt in the Knoxville area.

Defendant has shown power to control prices in both the Knoxville and the New Mexico area as well as in the Chicago and other areas in the United States. Its intent to control such prices to accomplish its own aims has been clearly shown. Not only has its power to exclude competitors been shown, but it has actually accomplished such exclusion. Under the proof in this case, defendant has developed monopolistic control over the asphalt roofing industry in the United States not just in the Knoxville area.

Under the circumstances of this case, the fact that Fry, alone, had only twelve and one-half per cent of the asphalt saturated felt business in the United States is not determinative on the question of whether it actually had a monopoly or had monopoly power. As has been shown, asphalt roofing products are comparatively heavy in relation to their value, and, therefore, transportation becomes a major item of expense (R. 612, 1478). Fry through the location of its plants throughout the United States was able to use this factor to the fullest extent in forcing its will as to prices upon all other manufacturers of asphalt

roofing products. It could pick any competitor, lower prices around that competitor's plant or plants to the point where they were unprofitable and yet, itself, remain in a profitable position by raising prices near its other plants in areas far distant from such competitor's plants. Under such circumstances, the percentage of the market enjoyed by Fry has little or no bearing upon its de facto monopoly power.

"The relative effect of percentage command of a market varies with the setting in which that factor is placed." **United States v. Columbian Steel Co.**, 334 U. S. 495, 528 (1947).

The Court below held that since plaintiff has charged and proven that Fry conspired to monopolize, "In the light of that evidence we think the plaintiff failed to make a prima facie case that defendant alone had the power to monopolize the industry on asphalt saturated felt." In this connection we would comment that there is no conflict whatsoever between the charge of monopolization and conspiracy to monopolize. The conspiracy could be and, we submit, in this case was used to make defendant's monopoly power more complete and more easily and surely exerted. In the second place, there was no burden upon the plaintiff below to "make a prima facie case". All that plaintiff was obligated to do was to establish, to the satisfaction of the jury, by a preponderance of the evidence, that defendant had monopoly power.

B. **The Court's charge, taken as a whole, was adequate on the monopoly issue, but even if there was error no adequate objection was made by defendant.**

A reading of the Court's entire charge to the jury in this cause shows that it is very fair, clear, and complete. The charge covers every phase of the case and states the

issues to be considered by the jury very clearly and concisely. With specific reference to those portions of the charge dealing with the monopoly issue, we would point out that the Court first quoted the statute (R. 2190). Later in its charge, the Court set forth the issues to be determined by the jury and clearly differentiated between the conspiracy, monopoly, and price discrimination issues (R. 2195). Thereafter, in specifically and definitely stating the issues, the Court stated with reference to the monopoly question as follows:

> "Second—this is the second issue—: Did the defendant, alone or in combination with other roofing manufacturers, monopolize or attempt to monopolize the sale of asphalt roofing products in the above area by fixing prices of such products in said area lower than prices fixed in other non-competing areas in violation of the Anti-Trust Laws; and if so, did plaintiff sustain damages as a direct and proximate result of such alleged violation of the Anti-Trust Laws?
>
> "If you answer that issue yes, again your verdict would be for the plaintiff on this count of the complaint, which is the monopoly count. But if you answer that issue no, your verdict would be for the defendant on the monopoly count of the complaint" (R. 2196).

Contrary to the inference from the Appellate Court's statement that in summing up in his charge on monopoly, the Trial Court defined conspiracy without relating it to monopoly, and that the Court thus confused the jury as to the difference between monopoly with and without conspiracy, we submit that the Court explained the difference very carefully. Prior to defining conspiracy, the Court stated:

> "There are various ways in which the Sherman and Clayton Acts as amended may be violated by which

trade and commerce can be restrained. Such acts may take the form of conspiracy, monopolizing and price discrimination. Those are forms in which commerce has been restrained. A combination to suppress competition or to monopolize or attempt to monopolize the asphalt roofing business is an illegal combination. Under Section 2 of the Sherman Act, there may be a monopoly or an attempt to monopolize without a conspiracy to do either" (R. 2199).

Again, in defining the term monopolize, we submit the Court clearly differentiated between conspiracy to monopolize and monopoly by a single individual. The full statement of the Court on this subject follows:

> "The term 'monopolize' as used in Section 2 of the Sherman Act means the joint acquisition or maintenance by the members of a conspiracy of the power to control and dominate interstate trade and commerce in a commodity to such an extent that they are able as a group to exclude actual and potential competitors from the field, accompanied with the general purpose to exercise such power. But it is not necessary that there be a conspiracy or combination on the part of one party with another or others in order to violate Section 2 of the Sherman Act. Any individual or corporation alone may offend against the provisions of Section 2 of the Sherman Act by monopolizing or attempting to monopolize interstate trade or commerce" (R. 2203).

In other words, here the Court has said that in order for an individual to monopolize he must have "the power to control and dominate interstate trade and commerce in a commodity to such an extent that he is able to exclude actual and potential competitors from the field, accompanied with the general purpose to exercise such power."

Again we submit that, as a matter of law, the Court's charge taken as a whole (the statements herein quoted, taken together with the other statements contained in the charge and dealing with the subject of monopoly, which, in order to conserve space, we do not copy in this petition) is an excellent and adequate charge. In determining whether there is error in the charge the Court will look to the entire charge and not alone to isolated portions of it. See **Baltimore & Potomac Railroad Co. v. Mackey**, 157 U. S. 72, 86-87 (1894); 3 Am. Jur., **Appeal & Error**, § 1097.

Regardless of any imperfections which may be pointed out in the Trial Court's charge on the question of monopoly and attempt to monopolize (and could any reasonable mind upon the face of the record arrive at the decision that the jury found that the defendant individually monopolized, but found that the defendant was not guilty on any other count or issue?), the defendant should not have been heard to complain of the charge in this particular—that is, the submission of the question of "alone monopolizing"—for the reason that the defendant made no proper and understandable objection pointing out the Court's error as required by Rule 51. This rule provides that "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects **and the grounds of his objection.**" (Emphasis ours.)

The portion of the charge criticized by the Appellate Court has been set out above.

The entire objection to this portion of the charge is a short paragraph reading as follows:

> "Mr. Weitzenfeld: We object to the charge because the charge as given did not separate monopolization or attempted monopolization individually as charged.

from that monopolization or attempted monopolization allegedly resulted from a conspiracy, and in that respect we submit the charge to the jury is confusing" (R. 2224).

It is respectfully submitted that the foregoing language can in no way be said to have been sufficient to alert the Court to the fact that counsel thought that there was insufficient evidence to go to the jury on the question of the defendants having alone accomplished a monopoly. If, indeed, counsel did have that thought in mind, then we submit the language used in his objection appears more to have been used to disguise his thought than to convey it. It was the duty of counsel, if it was his position that there was insufficient evidence to support this issue, to say so, and a failure to be explicit in this regard bars the defendant from thereafter attacking the instructions of the Court.

It would appear also from an examination of the portions of the Court's charge on the monopoly issue that the Court in drafting its instructions had in mind the alternative nature of Section 2 of the Sherman Anti-Trust Act, which provides that "Every person who shall monopolize or attempt to monopolize" shall be guilty, and that every person who shall "combine or conspire with any other person or persons to monopolize" shall be guilty.

In other words, the offense may be by reason of individual monopoly or attempt to monopolize, or that by reason of a combination or conspiracy. Evidently, from the language of the objection to this portion of the charge, this same thought lay in the mind of counsel for the defendant, and, if this be true, then it certainly cannot be stated that the ground upon which the instructions were held erroneous by Appellate Court were called to the attention of the Trial Judge.

Objections to a charge ". . . must be sufficiently specific to bring into focus the precise nature of the alleged error." **Palmer v. Hoffman**, 318 U. S. 109, 119 (1943).

We believe the rule is well stated in the case of **Holliday v. Great A. & P. Tea Co.**, 256 F. 2d 297, 302 (8th Cir. 1958), and is pertinent to this subject.

> "The objections interposed in the instant case did not distinctly state any grounds for the objections. The trial court was given no opportunity to correct or cure any possible defect or error in the instructions as given. The objections do not even tell us the matter to which they object in the questioned instructions and certainly do not state the grounds of their so-called objections. This is an appellate court and before we can properly say that the trial court was in error that court must have been given an opportunity to pass upon the question. Alleged errors cannot for the first time be urged in this court."

In the case of **Richfield Oil Corp. v. Karseal Corp.**, 271 F. 2d 709, 722 (9th Cir. 1959), the Court said:

> ". . . The purpose of the Rule is to give the court a chance to correct an erroneous instruction on the law. Though viewed realistically, we might hazard a guess that it would have been a difficult task, even by stating distinctly the grounds of the objection, to have caused the court to change its previously announced position. Nevertheless, to preserve the question on appeal, not only should the objection have been made, but the grounds thereof should have been distinctly stated."

In any event this whole discussion of defendant "alone monopolizing" is not of much importance in view of the overwhelming evidence on conspiracy, combination and

price discrimination. If any error was committed in submitting this issue, it should be disregarded because it would not have affected the substantial rights of the parties **(Rule 61, Federal Rules of Civil Procedure)**.

C. The rule of procedure, as applicable in Tennessee, to the effect that a general verdict is good in a multiple issue case where one or more issues are properly submitted to the jury even though another issue is erroneously submitted, controls in a Federal case in Tennessee, particularly if defendant did not request special verdicts or submission of interrogatories as provided by Rule 49.

The Court of Appeals announced a reversal in the following language:

> "The judgment of the District Court must be reversed for the reasons, that there is no evidence of monopoly in the relevant area by the defendant, individually, and for the failure of the trial judge to adequately instruct the jury on the issue involved" (A. 11a).

Previously, the court had reviewed the record on the charge that defendant had conspired to violate the anti-trust laws and had concluded:

> "We conclude that the trial judge's instructions to the jury, on the law of conspiracy, were correct and that the evidence as herein reviewed was sufficient to take the case to the jury on that issue" (A. 9a).

The time-honored practice in Tennessee in both the State and Federal Courts is to submit the issues of fact in a law case to the jury for a general verdict. While there is no specific rule to the contrary, special verdicts and interrogatories are employed, almost universally, only in the separate Chancery Courts of Tennessee.

Section 20-1317 of Tennessee Code Annotated provides:

"Verdict Applied to Good Count.

"If any counts in a declaration are good, a verdict for entire damages shall be applied to such good counts (Deriv. Act 1801, Ch. 6, Sec. 63)."

At the time of the trial in the instant case, December, 1960, the attitude of the Sixth Circuit Court of Appeals toward the general verdict in Federal trials in Tennessee was as announced in the cases of **Louisville and Nashville Railroad Company v. Rochelle**, 252 F. 2d 730 (6th Cir. 1958), and **Atlantic Coastline Railroad v. Smith**, 264 F. 2d 428 (6th Cir. 1959). In each case the Court held that in Federal Court litigation in Tennessee, the so-called Tennessee "two issue" statute controlled and a general verdict would be upheld in the event substantial evidence supported one or more counts of the declaration. No mention was made in these cases of the rule being applicable only in diversity cases.

Subsequent to the trial of the instant case, the Sixth Circuit had for consideration an appeal in the case of **Tracy v. The Finn Equipment Company**, 290 F. 2d 498 (6th Cir. 1961), likewise appealed from the United States District Court for the Eastern District of Tennessee, Northern Division. That cause involved a two count declaration seeking damages for personal injuries on the basis of breach of implied warranty and negligence, respectively. Subsequent to the trial of the cause and a verdict in favor of the plaintiff, the Trial Court, being convinced that he had been in error in submitting the issue of breach of warranty to the jury, entered an Order sustaining the defendant's Motion for New Trial which he thereafter amended, by allowing an interlocutory appeal to the plaintiff. The cause was appealed and on May 9, 1961, the Sixth Circuit issued its opinion reversing the lower court

and directing the entry of a judgment for the plaintiff upon the verdict.

This reversal was based upon the Court's approval of the application of the Tennessee statute (supra) validating general verdicts upon the good counts despite the erroneous submission of an issue, the Court saying:

> "While the Act is in this respect procedural, the United States Supreme Court has postulated a policy that in diversity cases the federal courts must follow even the procedural rules of the state in which it sits where an application of a different rule would cause a substantial likelihood of a different result had the matter been tried in the state court. In **Guaranty Trust Co. v. York**, 326 U. S. 99, the Court indicated the broad effect to be given to **Erie Railroad Company v. Tompkins**, 304 U. S. 64. That case involved a suit brought in the district court, with jurisdiction based entirely upon diversity of citizenship, to enforce in equity a state created right. There it was said:
>
> "'But since a federal court adjudicating a State created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the state, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.'
>
> "In **Byrd v. Blue Ridge Electric Cooperative**, 356 U. S. 525, the Court agreed that the **Erie** case supported the broad concept of **Guaranty Trust Company**, supra, that the federal court should conform as near as may be to state rules, even of form and mode, where the state rules may bear substantially on the question as to whether litigation would come out one

way in the federal court and another way in the state court."

The decision in the **Finn** case was the first pronouncement by the Sixth Circuit that the application of the aforesaid Tennessee statute **might** be limited to diversity cases.

In the instant case, the Court of Appeals disposed of the contention of the plaintiff that the two-issue rule required the verdict to be upheld in the following language:

> "The plaintiff Volasco claims that the 'two issue' rule is applicable in Tennessee and that, if other issues were properly submitted to the jury there can be no reversal because of an error in the submission of one issue. The plaintiff cites two cases from the Sixth Circuit, in support of this theory. **Louisville & Nashville Railroad Company v. Rochelle**, 252 F. 2d 730, C. A. 6, and **Atlantic Coastline Railroad Company v. Smith**, 264 F. 2d 428, C. A. 6. These cases are both diversity cases tried in Tennessee where the two-issue rule prevail (**Tenn. Cen. Ry. Co. v. Umenstetter**, 155 Tenn. 235) and under **Erie v. Tompkins**, 304 U. S. 64, the District Court must follow the substantive law of the state. Tennessee and Ohio are the only states in the Sixth Circuit to follow this rule. This case is tried under federal law where the 'two issue' rule is not applicable. **Wilmington Mining Co. v. Fulton**, 205 U. S. 60, 78, 79; **Baltimore and O. R. Co. v. Reeves**, 10 F. 2d 329, 330, C. A. 6; **Chicago and N. W. Ry. Co. v. Garwood**, 167 F. 2d 848, 857, C. A. 8; **Roth v. Swanson**, 145 F. 2d 262, 269, C. A. 8; **Atlantic Coastline Ry. Co. v. Tiller**, 142 F. 2d 718, C. A. 4."

The principal reliance of the Court of Appeals for precedent in the above decision is the case of **Wilmington**

Mining Co. v. Fulton, 205 U. S. 60 (1907). In that case the United States Supreme Court, speaking through Mr. Justice White, construed the Illinois statute which provided that a general verdict would not be reversed on the ground a defective count had been submitted, if one or more other counts be sufficient to sustain, to mean only, that the verdicts would not be set aside, where the unsupported counts were not vital. The Court cited as a basis for this decision two Illinois cases which the Court deemed to support its construction. Interestingly enough, the **Wilmington** case was a negligence action removed to the Federal Court from the Illinois State Court because of **diversity of citizenship** and if deemed authority upon the subject, the Sixth Circuit is greatly in error as to what is precedent.

It will be noted from the above excerpt from the opinion of the Court of Appeals that it categorically classifies the Tennessee statutes as "the substantive law of the state." Whereas, in the **Finn** case (supra), the Sixth Circuit termed it procedural.

This holding is in direct conflict with the holdings of other circuits.

The Seventh Circuit (1940) in the case of **Stephenson v. Grand Trunk Western R. R. Co.**, 110 F. 2d 401, has specifically held that the Illinois statute making a general verdict good if supported by good counts despite the submission of defective counts, is applicable in the trial of cases in the Federal Courts of Illinois, saying:

> "Thus we face opposing rules and must decide whether to follow that set forth in the **Wilmington** case, or the one as announced by the Supreme Court of Illinois, and we conclude that the latter is controlling. It is our judgment that the question involved is one of practice or procedure, in which the statute or

decision of the state court must be followed. We think we are justified in refusing to follow the Court in the **Wilmington** case because the Supreme Court of Illinois, so far as the Courts' opinion discloses, had not decided the question at that time and because the subsequent decision of the state court renders the rule announced in the **Wilmington** case inapplicable."

The decision of the Seventh Circuit is based on the view which we believe to be the majority view that rules and statutes applicable to the method of conducting a trial are procedural rather than substantive and that where the Federal Rules of Civil Procedure are silent, as in this case, the practice and procedure followed in the state where the Federal Court sits shall control. See **Atlantic Coastline R. Co. v. Dixon**, 207 F. 2d 899 (5th Cir. 1953). In that case, which arose under the Federal Employers' Liability Act, the Fifth Circuit held that matters respecting the remedy and admission of evidence, where not governed by the Federal Rules of Civil Procedure, will be governed by the law of the place of trial.

Indeed, it would appear that the Sixth Circuit may in the instant cause be in conflict with its own views. See **Gulf Refining Co. v. Fetschan**, 130 F. 2d 129 (6th Cir. 1942), where the Court said:

"Rule 49 (b) of the Rules of Civil Procedure provides that when the general verdict and answers are harmonious, the Court shall direct the entry of the judgment upon the verdict and answers. The failure to answer interrogatories is not fatal where the general verdict can be supported on other facts or where answers to such questions, favorable to the party against whom judgment is rendered, would not necessarily render the judgment erroneous."

An examination of the cases relied upon by the Sixth Circuit in rejecting the application of the "Two Issue

Rule" in the instant case reveals a clear cut conflict between Circuit Courts of Appeal on this question.

The only case cited by the Court from the Sixth Circuit is **Baltimore and Ohio R. Co. v. Reeves**, 10 F. 2d 329 (1926). This case is a diversity case where the Sixth Circuit set aside a verdict where one of the issues submitted was not supported. The Court in its opinion did not refer to any state rule, saying merely: "This is the established Federal rule." Two Eighth Circuit cases are cited and the case of **Atlantic Coastline R. Co. v. Tiller** from the Fourth Circuit, 142 F. 2d 718 (1944). The Eighth Circuit cases were both from Minnesota and in the case of **Roth v. Swanson**, 145 F. 2d 262 (8th Cir. 1944), being the earlier of the two, the Eighth Circuit cited as authority for its decision a Minnesota case, indicating it was following a state rule.

In the **Tiller** case (supra), the Fourth Circuit set aside a general verdict where one of the issues was improperly submitted "because the generality of the verdict renders it impossible to determine upon which theory the jury based it." As authority in the **Tiller** case, the Fourth Circuit cited the case of **Maryland v. Baldwin**, an 1884 decision of the United States Supreme Court, 112 U. S. 490, and five cases from the Eighth Circuit. Thus, it would appear that the decision on this question in the instant case not only conflicts with previous holdings of the Sixth Circuit and apparently follows decisions of the Fourth and Eighth Circuits but also conflicts with the holding of the Seventh Circuit in the **Stephenson** case (supra) and the Fifth Circuit in the **Dixon** case (supra) and we believe also with the reasoning of the Second Circuit hereinafter referred to.

We urge that the impeachment of the general verdict in this cause on the grounds set out is in direct violation of

Rule 49 of the Federal Rules of Civil Procedure and in conflict with the spirit of the rules as embodied in Rule 1 to the effect that "They shall be construed to secure the just, speedy and inexpensive determination of every action." This is true because it lay within the power of the defendant at the trial of this cause and at the time of the submission of the case to the jury upon a general verdict, to resolve any doubts as to the basis upon which the jury premised its verdict by requesting the Court to require the jury to render special verdicts or a general verdict accompanied by answers to interrogatories as provided by Rule 49. Can the defendant in good conscience complain of the submission for a general verdict where he stands by knowing the rule of the forum and fails to exercise his right to ask for special verdicts. To allow this, in effect, arms the defendant with the power to trap his adversary.

If such a procedure as this receives judicial approval, it can be expected that under such circumstances defendants would be encouraged to ignore the provisions of Rule 49 of the Federal Rules of Civil Procedure. Especially would such a result obtain in multiple count cases in which the defendant believes that the trial judge is erroneously submitting to the jury at least one of the counts. In such cases, although the defendant might strongly urge that such count not be submitted to the jury, nevertheless, if the court did submit such count to the jury, the defendant would thereafter be encouraged to sit by quietly—not avail himself of Rule 49—let the jury render a general verdict—with the expectation that if such general verdict is adverse to the defendant, it can be corrupted by relating it to a count which is in somewise defective or insufficient.

If such a result should ensue, then all the proceedings would be voided, the time and efforts of the court, the

jury and the litigants would be rendered for naught, and a retrial made necessary, all of which seems to do utter violence to the basic theory and purpose of federal procedure which seeks to secure a just, speedy, and inexpensive determination in every case.

This situation was considered by the Second Circuit in **Foster v. Moore-McCormack Lines, Inc.**, 131 F. 2d 907 (1942), a case arising under the Longshoreman's Act. In that Opinion, Judge Frank, while criticizing the use of the general verdict as a matter of practice, held that the general verdict was good, and that it was the duty of the defendant to use and rely upon the provisions of Rule 49, saying:

> "There was a conflict of testimony and it was for the jury to determine the issue of fact. Whether the jury carefully weighed the testimony, in the light of the judge's instructions, of course we do not know, and indeed are forbidden to inquire. There was a general verdict and such verdict 'throws its mantle of impenetrable darkness on the operations of the jury.' Appellant might have dissipated that darkness by asking under Rule 49, Rules of Federal Procedure, 28 U. S. C. A., following Section 723 (c) for a special verdict or for a general verdict accompanied by the jury's answers to interrogatories . . . But that wise rule, which would ensure keeping the jury in its proper place, is, for some dark reason, seldom used."

To the same effect, see **Filipek v. Moore-McCormack Lines**, 258 F. 2d 734 (2d Cir. 1958). This same line of reasoning has been followed in the Eighth Circuit. See **Bank of America v. Hyden**, 231 F. 2d 595 (1956), where the Court said:

> "Concluding, as we must, under the law and evidence as already set forth, that appellee had a cause

of action under the common counts for money had and received which was properly submitted to the jury under sufficient instructions as to the law to which no exception was taken, the general verdict of the jury may be sustained as based solely on a finding on said counts or causes of action and appellee's theory of damages applicable thereto." p. 603.

* * * * * * * *

"It should be stated that had there been a verdict returned as to each cause of action separately or had interrogatories been submitted and returned along with the general verdict the result might have been such as to permit further consideration of appellants' assignments of error. However, the record does not disclose appellants' request to either." p. 604.

IV.

PETITIONER, VOLUNTEER ASPHALT COMPANY, AS THE SUPPLIER OF ALL ASPHALT USED BY VOLASCO, IS NOT TOO REMOTE AS A MATTER OF LAW TO RECOVER FOR ITS OWN LOSSES DUE TO VIOLATIONS OF THE ANTITRUST LAWS BY DEFENDANT AIMED AT VOLASCO.

As stated in the Opinion of the Court of Appeals, plaintiff, Volunteer, relied upon two theories as a basis for recovery. In the first place, it was stated that the corporate fiction should be disregarded as the business of Volunteer and of Volasco was in truth and in fact a single unified business enterprise, the separate corporate entities having been formed merely for financial reasons. In the second place, it was urged that as a matter of Federal law, the petitioner Volunteer, as supplier of all asphalt used by Volasco, was directly injured by defendant's violation of the antitrust laws and, therefore, entitled

to recover. The Court of Appeals discarded both these theories, and, while we earnestly insist that it was in error on each count, we would here present argument only on the second, that is, that Volunteer was directly injured and, therefore, entitled to recover.

The statute says, "Any person who shall be injured . . . may sue therefor . . ." (15 U. S. C., § 15).

It is true that the older cases under the antitrust laws generally held that a supplier of products to one who is the direct target of antitrust violations is too far removed or too remote to recover from those guilty of the violations. It is submitted that the reasoning of these cases is unsound as there is no such limitation in the statute and no such limitation should be read into it. The later decisions of the Appellate Courts, particularly the Seventh and Ninth Circuits, have clearly departed from this rule, and it is submitted that such holdings are sound. This Court should grant certiorari in this case in order to settle finally this important question of Federal law.

The Seventh Circuit in the case of **Congress Building Corp. v. Loew's, Incorporated**, 246 F. 2d 587 (7th Cir. 1957), overruled a long line of theatre cases beginning with the case of **Harrison v. Paramount Pictures, Inc.**, 115 F. Supp. 312 (D. C. E. D. Pa.) aff'd 211 F. 2d 405 (3rd Cir. 1954), cert. den. 348 U. S. 828, and held that the lessor of a theatre could recover from the parties to a conspiracy, in violation of the antitrust laws.

In that case a non-operating lessor of a theatre building filed suit against its lessee and certain motion picture distributors charging a conspiracy between them in violation of the antitrust laws. The lease between the plaintiff and its lessee, the operator of the theatre, was a percentage lease based upon the gross receipts of the theatre. The charge was that by virtue of the conspiracy the gross

receipts of the theatre were decreased, and, therefore, the plaintiff's rental was decreased. One factor in that case not present in our case was that the lessee of the theatre, that is, the person on whose business the additional income of the plaintiff depended, was also a member of the conspiracy. However, the Court in its opinion, at least by inference, held this factor to be immaterial.

The following portions of the opinion are, we believe, pertinent:

> "If the plaintiff's allegations are proved, we are at a loss to see how it can be said that it has not been injured. In fact, everyone seems to concede the existence of the injury but then counter with the argument that it is too remote to be compensable. We think the alleged acts of the defendants are clearly the direct and proximate cause of the injury. What intervening factors are there to consider? The only one that suggests itself is that if competitive conditions had prevailed would the lessee's operation of the theatre have been more profitable with resulting pecuniary benefit to the lessor under the percentage clause. This problem, however, is present when a lessee sues. See **Bigelow v. RKO Radio Pictures, Inc.**, 327 U. S. 251, 66 S. Ct. 574. In fact, the similarity between the proof necessary in each of these cases is obvious. The anti-trust violation has allegedly decreased the receipts of the enterprise by an amount which is ascertainable and recoverable where the lessee sues. See **Bigelow v. RKO Radio Pictures, Inc.**, supra. For a lessor to establish the extent of his injury under the percentage clause, he would make virtually the same proof as the lessee. The only hidden assumption in this analysis is that in most instances the interests of the lessor and lessee would coincide. In other words, whatever operation of the

theatre would produce the greatest return for the lessee would also produce the greatest return for the lessor. Only when the outside interests of the lessee dictated a less profitable operation of the lessor's theatre would there be a divergency in their respective interests."

The action of the Sixth Circuit is not only in conflict with that of the Seventh Circuit in the **Congress** case, is also in conflict with the holding of the Ninth Circuit in the case of **Karseal Corp. v. Richfield Oil Corp.**, 221 F. 2d 358 (9th Cir. 1955). In that case plaintiff, a manufacturer of automobile polish, marketed its product through independent distributors or filling stations. The defendant made contracts with filling stations whereby it would permit them to sell its gasoline only on condition that they sold an automobile polish sponsored by it and competitive with that of the plaintiff. In holding that plaintiff was entitled to maintain its action, the Ninth Circuit stated:

> "Apparently, Richfield's argument is in part, that the independent distributors of Karseal's Wax might have a cause of action, but that Karseal is once removed from the distributors and therefore may not sue. We need not pass on whether such distributors have a cause of action. But it would appear that both the manufacturer and the independent distributor have such a cause of action. Statutes constitutional on their face must be constitutionally applied. Classes or categories affected by a statute must rest on a realistic basis. To say to a manufacturer of wax that he may have the protection of the Anti-Trust laws in private litigation if he hires salesmen for his product, and not have such protection if he decides to contract with a distributor, would appear to be an unequal application of the law and unjustified dictation as to how he operated his business."

> We are required to interpret congressional enactments in a manner consistent with their constitutionality, if possible. An interpretation which would read into the statute an unjustifiable restriction as to persons authorized to bring the action might call for invalidation of the statute. The language of the statute does not warrant such restrictive interpretation. The Congress in the Clayton Act, stated in Section 4, '**Any person** who shall be injured * * * may sue * * *' (Emphasis added). The Congress did not attempt to limit the relief to those manufacturing or distributing."

The Sixth Circuit's attempt to distinguish this case from the case at bar on the ground that Karseal was the manufacturer of the finished product, whereas, Volunteer supplied raw materials, is unsound from a logical standpoint. The conclusion that Volunteer furnished only raw materials is also inaccurate as the evidence shows that Volunteer manufactured the mopping asphalt and merely pumped it into a shed owned by Volasco where it was poured into drums and, then, marketed by Volasco (R. 89, 94). Volasco's function in such a case is very little, if any, different from the function of a retailer removing Karseal's polish from the cases in which it is received, and then placing it on the shelf for sale.

Volasco was Volunteer's only customer for roofing asphalt (Ex. 162, R. 537, 2529) and it has no other potential customer outlet for roofing asphalts as the nearest roofing plants are at least 200 miles from Knoxville (R. 142-6).

Volunteer's stock ownership is identical with that of Volasco (R. 560). Volunteer has a large investment in plant and equipment which would not have been made but for the opportunity of a profit in the asphalt roofing business (R. 1293). Volunteer also advanced large sums

of money to Volasco to further its growth and thereby increase the revenues of Volunteer (R. 533-34; Ex. 158, R. 515, 2325). The refinery would not have been built without the Volasco opportunity to make a profit (R. 1293). Volunteer, thus, was sharing the business risks with Volasco, and as said by the Court in **Congress Building Corporation v. Loew's**, 246 F. 2d 587, 593, "Since plaintiff accepted some part of the business risks, plaintiff would appear to be entitled to rely on statutory remedies whose purpose is to reduce such risks".

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari ought to be granted.

Dated, November 28, 1962.

Respectfully submitted,

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OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Nos. 14545-6-7

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

Volasco Products Company,
Plaintiff-Appellee,

v.

Lloyd A. Fry Roofing Company,
Defendant-Appellant.

Volunteer Asphalt Company,
Plaintiff-Appellant,

v.

Lloyd A. Fry Roofing Company,
Defendant-Appellee.

Volasco Products Company,
Plaintiff-Appellant,

v.

Lloyd A. Fry Roofing Company,
Defendant-Appellee.

Appeals from the United States District Court for the Eastern District of Tennessee, Northern Division.

Decided September 12, 1962.

Before: Cecil and O'Sullivan, Circuit Judges, and Boyd, District Judge.

Cecil, Circuit Judge. These appeals are from the United States District Court for the Eastern District of Tennessee, Northern Division. Volasco Products Company and

Volunteer Asphalt Company, as plaintiffs, brought an action against Lloyd A. Fry Roofing Company, defendant, charging it with violation of the anti-trust laws, to their damage. The parties will be referred to as plaintiffs and defendant, as they were in the District Court, or as Volunteer, Volasco and Fry.

The action arises under the Sherman Act and the Clayton Act, Title 15 U. S. C., sections 1-27. The particular sections of the Sherman Act involved are sections 1 and 2 (Title 15, sections 1 and 2) the pertinent parts of which are as follows: Sec. 1 "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." Sec. 2 "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, . . ."

Sections 2 (a) and 2 (b) of the Clayton Act, as amended by the Robinson-Patman Act (Sections 13 (a) and 13 (b), Title 15, U. S. C.) are invoked by plaintiffs and so far as pertinent read as follows: Sec. 2 (a) That "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . ., where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery re-

sulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . . And provided further, That nothing herein contained shall prevent price changes from time to time . . . in response to changing conditions affecting the market for or the marketability of the goods concerned."

[2] Sec. 2 (b): "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

Under section 4 of the Clayton Act (Section 15, Title 15, U. S. C.) any person who is injured in his business or property, by reason of anything forbidden in the above quoted anti-trust laws, may sue for damages in a District Court of the United States and recover threefold the damages sustained, together with costs and a reasonable attorney fee.

The plaintiffs are corporations organized and existing under the laws of the State of Tennessee and doing business in that state, with headquarters at Knoxville. Both corporations are owned by the same stockholders and have the same officers. Volunteer was organized in 1954 for the purpose of operating an asphalt refinery for both road and roofing asphalt. Volasco was organized in 1955 for the

purpose of manufacturing asphalt roofing materials, including asphalt saturated felt, asphalt roll roofing, and asphalt shingles. Volunteer had been operating its refinery since 1954 and Volasco had been manufacturing and selling saturated felt, as well as some other asphalt roofing products since 1955. Volasco never got into production of roll roofing and asphalt shingles.

Fry is a corporation organized under the laws of Delaware; is doing business in Tennessee and is the largest manufacturer of asphalt roofing products in the United States. It owns and operates nineteen plants strategically located throughout the United States. Its closest plants to Knoxville are at Memphis, Tennessee, and at Brookville, Indiana. The defendant, with seven other large companies, do approximately sixty-five percent of the business in the United States in asphalt roofing, siding, felts and shingles.

Briefly stated, the plaintiffs charged that the defendant cut prices in the Knoxville area, where the plaintiffs did business, below the plaintiffs' prices, while at the same time it maintained higher prices in territory outside of plaintiffs' limited field of operations. They also charged that the defendant combined and conspired with other large manufacturers of asphalt products to engage in an identical pricing program, for the purpose of creating a monopoly and destroying competition.

The issues as presented by the complaint are substantially and briefly as follows: 1. Did the defendant Fry conspire with one or more other manufacturers of roofing products to fix prices in violation of the anti-trust laws within an approximately 200-mile radius of Knoxville, Tennessee? 2. Did the defendant alone or in combination with other roofing manufacturers, monopolize or attempt to monopolize the sale of asphalt roofing products in the above area by fixing prices of such products in the area

lower than prices fixed in other non-competing areas, in violation of the anti-trust laws? 3. Did the defendant, during the relevant period, discriminate in prices between two or more purchasers of asphalt roofing products on a geographic basis, by charging purchasers within the approximate 200-mile radius of Knoxville area a lesser price than purchasers outside that area, the effect of which discrimination may have been substantially to lessen competition, to create a monopoly or to injure, destroy or prevent competition, in violation of the anti-trust laws? And if the defendant did so discriminate in prices within the relevant area, did it do so in good faith to meet an equally low price of its competitors? 4. Did the plaintiffs suffer damages as a direct and proximate result of any of the alleged violations of the anti-trust laws by the defendant?

The case was tried to a jury and a verdict was returned in favor of the plaintiff Volasco Products Company in the sum of One Hundred Thousand Dollars ($100,000). The District Judge trebled this amount and gave judgment to the plaintiff Volasco Products Company for Three Hundred Thousand Dollars ($300,000), plus Sixty Thousand Dollars ($60,000) attorneys' fees. (Section 15, Title 15, U. S. C.) The District Judge also entered an order of injunction against the defendant enjoining it from further violation of the laws in respect to the matters charged in the complaint. The defendant appealed and this appeal is number 14545 on the docket of this Court. At the close of the plaintiffs' testimony, the trial judge directed a verdict in favor of the defendant and against the plaintiff Volunteer Asphalt Company. Volunteer appealed and its appeal is number 14546 in these appeals. Hereinafter the term "plaintiff" will be used in the singular to mean Volasco. The District Judge ruled against Volasco on certain items and claims of damages and it appealed, which appeal is number 14547 on the docket.

We will proceed first with the defendant's appeal. One of the first assignments of error for discussion relates to the first issue stated above and raises the question of whether there was sufficient evidence of conspiracy to submit that issue to the jury.

A review of the record discloses that there was substantial evidence bearing on this issue. When Volasco began manufacturing asphalt saturated felt, in October 1955, it set its price in line with that of the major roofing manufacturers, which was $2.44 per roll. At this time, Fry's price was $2.24. Effective November 1st of that year, Fry reduced its price in the Knoxville-area to $1.84 per roll. Volasco then adjusted its price lower and sold at $2.12, $2.11, $2.00 and for one day at $1.84.

On February 19, 1956, Fry published a new price schedule with a new method of marketing, involving an intricate system of zoning. On this schedule, the price at Knoxville was fixed at $2.16 per roll. All of the major roofing manufacturers, effective on February 19th or a day or two thereafter, abandoned their former pricing methods and adopted the Fry plan with its schedule of prices. They published price lists substantially identical with that of Fry, even down to an apparently erroneous zone classification of Blount County, subsequently changed by Fry. (Ex. 95, 96, 97.)

From February 19, 1956, until March 3, 1958, Fry published thirteen price schedules. With this last schedule it again changed its pricing system. It abandoned the county zone plan and established a uniform list price for its products for the whole of the United States east of the Rocky Mountains. Under this schedule the price in Tennessee was $1.62 per roll, and with a secret year-end rebate, it was $1.54. As of this date, no other manufacturer had sold asphalt saturated felt as low as $1.62 per roll in the

Knoxville area. This schedule was also followed by the other companies. Mr. Fry, Jr., said, on cross-examination, that generally speaking the prices of all major companies had been the same since February 1956.

Beginning with February 4, 1957, there were eight price changes. In all of these, the Knoxville price was substantially lower than the Chicago price, and in all but one, it was lower than the Brookville price. The trend of these prices was downward.

Mr. Lloyd A. Fry, Sr., and his son, Lloyd A. Fry, Jr., were not members of the Asphalt Roofing Industry Bureau, but they attended some of their meetings socially. Mr. Fry, Jr., attended a meeting, at the Westchester Golf and Country Club, in Rye, New York, in October 1955. He attended another one at the Essex House, in New York City, in October 1956. Both Mr. Fry, senior and junior, attended a meeting of the Bureau at the Blackstone Hotel, in Chicago, in the spring of 1956. They did not attend business sessions, but most of the leaders in the industry were present, and the conversations ranged over various subjects, including some discussion of business and its competition.

On February 23, 1956, four days after the effective date of the February 19th new marketing plan, Mr. J. J. Musico, Manager of Fry's Brookville, Indiana, plant, said, in answering the complaint of a customer:

> "I know by this time that you have the new merchandising plan which I understand the entire Industry has adopted and it is with my very honest opinion that this will clean up all this mess. . . .
>
> * * * * * * * *
>
> ". . . I am of the firm opinion that the Roofing Industry's House should be, and will be clean, for the first time. . . ." (Ex. 123.)

In a letter to another customer, on April 13, 1956, he wrote:

> "You will note that Blount County is now Zone 2 which puts it in line and I am sure that you will find all other manufacturers quoting on this same basis." (Ex. 124.)

In another letter to a customer, on April 27, 1956, he wrote:

> "I am well aware of the activities of these small Arkansas manufacturers and I assure you that we are watching them very closely. As usual, they are taking advantage temporarily, of an attempt to stabilize an industry which is long overdue for some stabilization from the view point of the wholesalers, dealers and roofers.
>
> . . . . . .
>
> "Nevertheless, I agree that they are a thorn in the side and in due time will be dealt with.
>
> . . . . . .
>
> ". . . At that time, if the menagerie is not changed there we will take corrective action." (Ex. 34.)

Some of the smaller roofing companies bore such names as Bear, Elk and Leopard, and were collectively referred to by the industry as "menageries."

> "The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances, as well as in an exchange of words." **American Tobacco Co. v. United States**, 328 U. S. 781, 809, 810. See also: **United States v. Parke, Davis and Co.**, 362 U. S. 29, 44. Proof of parallel business behavior does not in itself constitute a Sherman Act offense. "The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agree-

ment, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement." **Theatre Enterprises, Inc. v. Paramount Film Distributing Corp. et al.**, 346 U. S. 537, 540.

"It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. (Citations.) Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." **Interstate Circiut, Inc., et al. v. United States**, 306 U. S. 208, 227; **United States v. Masonite Corp.**, 316 U. S. 265, 275. See also: **American Tobacco Co. v. United States**, above cited, at p. 810; **United States v. Gypsum Co.**, 333 U. S. 364, 394.

We conclude that the trial judge's instructions to the jury, on the law of conspiracy, were correct and that the evidence as herein reviewed was sufficient to take the case to the jury on that issue.

Other assignments of error which relate to the submission of issues to the jury are that the court erred in submitting to the jury the issues of monopolization and attempted monopolization.

Section 2 of the Sherman Act (Section 2, Title 15, U. S. C.) provides that it is a violation of the law for a **person** to monopolize or to attempt to monopolize, or for a **person** to combine or conspire with any other persons to monopolize any part of the trade or commerce among the several states.

The essentials of monopolization are, the power to raise or fix prices, to eliminate competition at will, or to unrea

sonably restrict competition, and the intent to exercise that power. **United States v. DuPont & Co.**, 353 U. S. 586, 592; **United States v. DuPont & Co.**, 351 U. S. 377, 389; **American Tobacco Co. v. United States**, 328 U. S. 781, 811; **United States v. Griffith**, 334 U. S. 100, 107.

The evidence discloses that the defendant was the largest manufacturer of asphalt saturated felt in the United States. It was not the largest company manufacturing this product and in 1958 it was responsible for about twelve and one-half percent of the total sales of the industry in the United States. Some ten or eleven large companies were in the field and it was a highly competitive article. The relevant area in this case is described as the territory within two hundred miles of Knoxville. Most of the large companies, including the defendant, were selling in the relevant area during the years 1956, 1957 and 1958. The combined production of these large companies accounted for more than sixty-five percent of the gross sales of the industry in the United States, during the years herein involved.

There is no evidence of the percentage of the business which the defendant had in the relevant area. It seems unreasonable and impossible to assume that alone it could have monopolized the business in the Knoxville area with only a twelve and one-half percent of the total business of the country.

Under another claim in this case, it is charged that the defendant entered into a conspiracy with other large manufacturers to control prices in the relevant area, in order to exclude the competition of the small manufacturers of the product in question. We have held herein that there was sufficient evidence on that issue to submit to the jury. In the light of that evidence, we think the plaintiffs failed to make a prima facie case that the defendant alone had the power to monopolize the industry on asphalt sat

urated felt. Even if it could be construed that there is evidence that the defendant alone monopolized, or tended to monopolize the industry, there is no adequate instruction to the jury on the subject.

Counsel for the defendant specifically objected to the instructions to the jury for the reason that the trial judge did not separate monopolization and attempted monopolization, individually, from that alleged to have resulted from conspiracy.

Had the trial judge, in his instructions to the jury on monopoly, limited his charge to that part of the statute pertaining to a combination or conspiracy to monopolize, the issue could have been properly submitted to the jury. In defining the second issue, he said: "Did the defendant, **alone** or in combination with other roofing manufacturers. . . ." (Emphasis added.) Again, in defining monopoly he said: "Any individual or corporation **alone** may offend against the provisions of Section 2 of the Sherman Act by monopolizing or attempting to monopolize interstate trade or commerce." (Emphasis added.) In summing up in his charge on monopoly, he defines conspiracy without relating it to the issue of monopoly.

The judgment of the District Court must be reversed for the reasons, that there is no evidence of monopoly in the relevant area by the defendant, individually, and for the failure of the trial judge to adequately instruct the jury on the issue involved.

The plaintiff Volasco claims that the "two issue" rule is applicable in Tennessee and that, if other issues were properly submitted to the jury, there can be no reversal because of an error in the submission of one issue. The plaintiff cites two cases from the Sixth Circuit, in support of this theory. **Louisville & Nashville Railroad Company v. Rochelle**, 252 F. 2d 730, C. A. 6, and **Atlantic Coastline**

Railroad Company v. Smith, 264 F. 2d 428, C. A. 6. These cases are both diversity cases tried in Tennessee where the two-issue rule prevails (**Tenn. Cen. Ry. Co. v. Umenstetter**, 155 Tenn. 235) and under **Erie v. Tompkins**, 304 U. S. 64, the District Court must follow the substantive law of the state. Tennessee and Ohio are the only states in the Sixth Circuit to follow this rule. This case is tried under federal law where the "two issue" rule is not applicable. **Wilmington Mining Co. v. Fulton**, 205 U. S. 60; 78, 79; **Baltimore and O. R. Co. v. Reeves**, 10 F. 2d 329, 330, C. A. 6; **Chicago and N. W. Ry. Co. v. Garwood**, 167 F. 2d 848, 857, C. A. 8; **Roth v. Swanson**, 145 F. 2d 262, 269, C. A. 8; **Atlantic Coast Line R. Co. v. Tiller**, 142 F. 2d 718, C. A. 4.

Another assignment of error involves an essential and important issue—proof of the proper measure of damages. The Court allowed evidence of damages for loss of profits on asphalt saturated felt, mopping asphalt and coatings. The complaint was filed by the plaintiffs April 17, 1958. The Court took that date as the cut-off date for damages and allowed no proof of damages subsequent to that time. Volasco began its operations in October 1955. The crucial years for which Volasco claims damages are the years ending April 17, 1957 and 1958.

The plaintiff offered evidence to establish that had it not been for the alleged illegal competition of the defendant, it would have manufactured and sold 115,000 rolls of asphalt saturated felt in 1957 and 195,000 rolls in 1958. To arrive at these potentials, George C. Krug, president of Volasco, assumed that mopping asphalt and felt moved in a certain relationship to each other. On this basis he worked out a formula as follows: For the year ending April 30, 1956, Volasco sold 21,287 drums of asphalt. During the next year, it sold 52,598 drums. This was an increase of 247 percent the second year over the first. For the first full year of felt sales, ending April 30, 1957,

Volasco sold 78,914 rolls of felt. On the theory that there would be a corresponding increase in felt the second year over the first, as there was between the first and second years in mopping asphalt, Mr. Krug took 247 percent of the felt sales for the year 1957 and arrived at a figure of 194,917 rolls as the potential for the year ending in April 1958.

Mr. Krug then drew a graph (Ex. 197) with the number of rolls indicated vertically along the left side of the graph and the time running horizontally along the bottom. September 1955 was represented as the zero point, at the lower lefthand side of the chart. A straight line was then drawn diagonally to the upper righthand corner representing 195,000 rolls in April 1958. This diagonal line crossed the date line of April 1957, at 120,000 rolls. Mr. Krug reduced this figure by 5,000 rolls and took 115,000 as the number of potential rolls for the first full year of manufacture. Thus we have the potential for the second year calculated on the basis of the actual number of rolls for the first year. Then the potential for the first year is determined from the potential of the second year.

This we think is a fallacious method of calculation for the reason that there is no evidence to support the claim that there is a general overall pattern that mopping asphalt and felt move in any particular relation to each other. There is no complaint that the alleged illegal competitive prices involved mopping asphalt. Mr. Krug testified that mopping asphalt fell off with sales of felt but he made no explanation of this. Maybe sales of that product were not pushed. We do know that the salesman was taken off the road when the competition on felt became oppressive. Furthermore, it is not reasonable that business will increase in the proportion indicated on the graph. The trial judge ruled out evidence that would have carried this business progression on in a continued straight diagonal line.

through 1960 and 1961. This has no bearing on the case, except to point up the fallacy of the claim.

As we have previously said, felt was a highly competitive article. Assuming legitimate competition of the ten or eleven large companies in the field, each of which was entitled, in good faith, to meet competition, the plaintiff could not have expected to dominate his chosen area, to the extent of increasing sales 247 percent a year.

In order to double-check his projection, for the first year of felt sales, Mr. Krug referred to his customer accounts and worked out another formula. He took the first year of Volasco's operation, ending in September 1956, and found that at the end of that year the company had 141 customer accounts and sold them 57,941 rolls of felt. Starting with no accounts at the beginning of the year, the average number for the year was 70. This would be equivalent to 822 rolls per account. For the year April 1956 to April 1957, the company started the year with 98 accounts and ended it with 183. This was an average of 140 accounts for the year. On the basis of 822 rolls per account, the projection for the year was 115,491 rolls.

If the company maintained its 98 accounts and received 85 new ones during the year—what did it sell to those accounts? Did it sell mopping asphalt and coatings only? Or did it sell felt? If they sold some felt to these customers, how were they affected by the alleged illegal competition? Did these customers buy some felt and then refuse to buy more because of the lower prices of the alleged conspiracy? There is no evidence to show why these customers did not buy their alleged quota of 822 rolls. If they bought mopping asphalt and coatings only, then the claim that asphalt and felt move in a fixed relation to each other fails. Actual sales of asphalt increased to 59,430 drums in 1958, an increase of about thirteen percent over 1957. During the same period, felt decreased

from 78,914 rolls in 1957 to 61,271 rolls in 1958. In the two succeeding years, as shown by exhibit 163, sales of asphalt increased to 72,856 and 79,915 drums, respectively. During these same years, felt sales decreased to 50,326 and 37,729 rolls, respectively. While the court did not allow the plaintiff to prove damages for the years 1959 and 1960, the evidence does refute Mr. Krug's claim that when felt sales fall off the sale of asphalt also diminished.

Mr. Sam C. Bye, an accountant, of Cleveland, Ohio, testified with reference to a market study he claimed he made of the area of Fry's Morehead City, North Carolina, plant, and the area of the plaintiff's plant at Knoxville. He testified that these areas were similar in respect to size, population, and commercial and residential buildings, etc. He further testified that the Fry plant shipped 275,000 rolls of felt in 1957 and 341,000 rolls in 1958. From this he deduced that Volasco would have a potential of 300,000 rolls per year. He then testified "that with an aggressive sales organization and a determination on the part of management to give their customers in the sales area a good service and fast service, I think that it would be entirely reasonable to assume that they could have reached the 195,000 rolls by the end of April 1958." How he arrived at this figure is unexplained. He applied no mathematical formula. It appears to be a figure arbitrarily taken out of thin air. It happens to be the same figure that Mr. Krug had on his graph (Ex. 197) arrived at, as heretofore explained, by an equally unsound method of calculation.

The witness was asked if he had an opinion as to whether the sales activity and the other matters about which he testified were such that Volasco could have reached 195,000 rolls in 1958. When an objection was made to the question, the court asked him if there was any way that he could answer the question from an accounting standpoint. He

said that he could do it statistically and then used the same formula that Mr. Krug had used to arrive at 195,000 rolls for 1958. This figure is wholly unrelated to the arbitrary one arrived at by the comparison method as above explained.

Mr. Bye conditioned his estimate on an aggressive sales organization and good service, etc., without knowing anything about Volasco's sales organization or its ability to give the kind of service he had in mind. One cannot say Morehead City shipped over 300,000 rolls in a year, therefore, Volasco in another area, even though essentially similar, could ship a similar number of rolls. A number of factors, unknown here, would be involved. We think this comparison was wholly irrelevant to the question of damages in the case at bar and that the trial judge was in error in admitting it into evidence.

We recognize that the plaintiff is not required to prove its damages with absolute mathematical accuracy and that the plaintiff is not to be denied damages simply because they cannot be computed with exactness. However, the evidence must furnish some approximation of the actual damages so that they may be determined with reasonable certainty. We believe that here the plaintiff, in an effort to be specific, has indulged in theories that result in proof that is speculative, remote and uncertain. **Bigelow v. R. K. O. Radio Pictures**, 327 U. S. 251; **Story Parchment Co. v. Paterson Co.**, 282 U. S. 555; **Eastman Kodak Co. v. Southern Photo Co.**, 273 U. S. 359.

We think the plaintiff was not entitled to recover for loss of sales on mopping asphalt and coatings. The prices of these products were not involved in the alleged price manipulations which affected felt sales. The evidence does not support Mr. Krug's statement that sales of those products decreased proportionately with the sales of felt.

Another item of damage allowed by the court was the loss of value to the business. The defendant claims that this was a duplication of damages. In calculating these damages, the plaintiff shows by Exhibit 194 that the actual investment in its property, as of April 18, 1958, was $188,741.13 and that its liquidating value, on the theory that it could not be operated as a felt manufacturing plant, was $148,840.00, a loss of $39,901.13. The plaintiff did not liquidate its business and when it received a verdict for lost profits and an injunction to prevent fur their illegal pricing, it was made whole and suffered no loss to its investment in its property. In **Story Parchment Co. v. Paterson Parchment Paper Co.**, 282 U. S. 555, the plaintiff was forced out of business. Both elements of damages were allowed in **Atlas Building Products Co. v. Diamond Block and Gravel Co.**, 269 F. 2d 950, 958, cert. denied, 363 U. S. 843, but there is no indication that they overlapped, as they do here.

The defendant challenges the competency of the testimony of Krug and Bye, with respect to the cost of defendant's production of felt. The purpose of this testimony was competent as bearing on the intention and good faith of the defendant. On the whole, we think the method of calculation was proper. There may have been some assumptions of facts not based on documentary or other evidence in the record. However, the trial judge can watch this and correct it, if necessary, in a retrial. It is interesting to note that the accountant's estimate of the defendant's costs is from $1.88 to $1.98 per roll, as compared with the plaintiff's costs of $1.71 in 1957 and $1.67 in 1958. (Exs. 195, 196.)

We are of the opinion that the objection of the defendant to Mr. Krug's testimony, at the close of the defendant's case, was proper and should have been sustained. This was not rebuttal testimony and while it may not

have been prejudicial it should be corrected on a retrial of the case.

Other errors have been assigned by defendant. Wherein such matters relate to discretionary rulings of the District Judge we find no abuse of discretion. Other matters relating to the conduct of the trial and the admission or rejection of evidence may not arise upon a new trial and we find it unnecessary to now consider them.

For the reasons herein stated, the judgment is reversed and the case remanded to the District Court for a new trial consistent with this opinion.

In case No. 14546, the plaintiff, Volunteer Asphalt Company, appeals from the judgment of the District Court in directing a verdict in favor of the defendant at the close of the plaintiff's testimony.

George C. Krug and his brother, J. A. Krug, early in July decided to go into the asphalt roofing business. Subsequently they determined to handle road asphalt also. At first they operated as a partnership, under the name of Tennessee Associates. In July 1954, they incorporated Volunteer Asphalt Company, for the purpose of conducting the business through a corporation. It was the original intention to carry on the roofing and road asphalt operation through this corporation.

In May of 1955, for financial reasons not pertinent to the issue here, they incorporated Volasco Products Company. The stock of both corporations was entirely owned by the two partners. Volasco became the manufacturer of the roofing products and Volunteer a supplier of raw materials for Volasco's manufacture.

The basis of Volunteer's claim for damages is that defendant's illegal actions reduced Volasco's sales of satu

rated felt, roof coatings and mopping asphalt, and that therefore the volume of raw material required from Volunteer was reduced and it in turn lost its profit on this material.

The trial judge dismissed Volunteer's complaint for the reason that it was a supplier and not directly injured by the alleged misconduct of the defendant.

This plaintiff claims that there are two theories, either of which will support its right to recover damages from the defendant. The first theory is that George and J. A. Krug owned all of the stock of both corporations and that, therefore, they were operating a unified business.

This flies in the face of all theories of corporate law. Corporations are separate entities, having various privileges, immunities and responsibilities, including the rights to sue and be sued. Individuals who desire to do business through a corporation gain some advantages and probably sacrifice others. The Krugs, for reasons sufficient to them, decided to operate through two corporations and they must now abide by the consequences. "They placed only one of the two corporations in direct competition with defendant. And their choice limits their potential recovery.", as was well said in **Snow Crest Beverages, Inc. v. Recipe Foods, Inc.**, 147 F. Supp. 907, D. C. Mass.

Their theory of a unified business is fallacious for the reason that if it were one business, there would be but one cause of action and one recovery. Of course, the claim for damages may have been larger, but the Krugs chose the field of activity for each corporation. It became corporate business not Krug's business. There are times when the law will look through corporate structure for the real party in interest, but **Chicago, Milwaukee and St. Paul Railway Co. v. Minneapolis Civic and Commerce Association**, 247 U. S. 490, and **California Zinc Co. v.**

United States, 72 F. Supp. 591, Court of Claims, as cited and quoted from by the plaintiff, are not applicable here.

The other theory is that because of Volunteer's connection with Volasco, as a supplier of all asphalt used by Volasco, it was directly injured by the defendant's violations of the anti-trust laws.

Counsel for plaintiff cite two cases, neither of which is in point. In **Karseal Corporation v. Richfield Oil Corporation**, 221 F. 2d 358, C. A. 9, the plaintiff was the manufacturer of a finished product, an automobile polish. The defendant made contracts with its filling stations whereby it would not permit them to use its gasoline, if they sold automobile polish other than the one sponsored by defendant. Volunteer supplies raw material and does not manufacture the finished product which is the subject of this action.

Congress Building Corporation v. Loew's, Incorporated, 246 F. 2d 587, C. A. 7, presents a wholly different state of facts. In this case the plaintiff, owner of a theatre, sued its lessee and certain motion picture distributors for a conspiracy in violation of the anti-trust laws. The plaintiff's rent was based on a percentage of the gross receipts. The claim of the plaintiff was that the conspiracy caused a decrease in the gross receipts and, as a result, plaintiff's rent was reduced. The lessee was one of the co-conspirators. The court held that there was an injury and that the alleged acts of the defendants were clearly the direct and proximate cause of the injury.

Counsel for plaintiff quote from the opinion in this case. "Not only is this 'limitation' (that is that a supplier is not directly injured) without support in the language of Section 4, but it appears to have been implicitly rejected by the Supreme Court." In support of this statement, the court cites **Radovich v. Nat'l Football League**, 352 U. S.

445, and **Bigelow v. R. K. O. Radio Pictures, Inc.**, 327 U. S. 251.

We do not find that these cases either reject or accept this limitation. It was not in issue in either case. Radovich was a football player and he brought an action against the National Football League for violation of the anti-trust laws. He was the person directly injured by the alleged illegal conduct. The Court said Congress had allowed for private enforcement of the anti-trust laws by an **aggrieved** party and that the laws protected the **victims** of the forbidden practices, as well as the public. Indirect and remote parties cannot be read into the word "victims."

In the **Bigelow** case, the plaintiffs were the owners and operators of a theatre and were the ones directly injured by the alleged anti-trust law violations of the defendant. In this case, the issue involved the proof of damages. The proof of plaintiffs' damages could not be calculated with certainty. The court said: "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created" (p. 265). This involved the damages of the plaintiffs who were directly injured and can not be extended to mean indirect or remote parties such as suppliers.

It is well established in the law that a supplier is too remote and too far removed from the direct injury to recover damages resulting from violation of the anti-trust laws directed against the supplier's customer. **Martens v. Barrett**, 245 F. 2d 844, C. A. 5; **Melrose Realty, Inc. v. Loew's, Inc.**, 234 F. 2d 518, C. A. 3, cert. denied, 352 U. S. 890, rehearing denied, 355 U. S. 900; **Productive Inventions v. Trico Products Corp.**, 224 F. 2d 678, C. A. 2, cert. denied, 350 U. S. 936; **Conference of Studio Unions v. Loew's, Inc.**, 193 F. 2d 51, C. A. 9, cert. denied, 342

U. S. 919; **Harrison v. Paramount Pictures**, 115 F. Supp. 312, 316, D. C. E. D. Pa., affirmed 211 F. 2d 405, C. A. 3, cert. denied, 348 U. S. 828; **Snow Crest Beverages v. Recipe Foods**, cited above.

The judgment of the District Court, in dismissing Volunteer's action against the defendant, is affirmed.

In case No. 14547, the plaintiff Volasco Products Company appeals from adverse rulings of the trial judge on the admission of evidence with reference to its claims on items of damages.

This is a conditional appeal to be considered by the Court only in the event a reversal is ordered in case numbered 14545.

The plaintiff claimed damages on asphalt shingles and roll roofing, on the theory that it was prevented from entering into the manufacture of those items by reason of the conduct of the defendant in violating the anti-trust laws.

Mr. George C. Krug testified that when he and his brother went into the asphalt business, it was their intention to also manufacture roll roofing and asphalt shingles. At the time the complaint was filed, the machinery for making these products had not been purchased. Mr. Krug claimed that the plaintiff had the plant capacity and the capital necessary to purchase and install the machinery required to equip the plant for the production of roll roofing and asphalt shingles. The cost would have been approximately $60,000.

The trial judge rejected the claim for damages on these items for the reason that the proof showed that the plaintiff never had the capacity to produce them, in that it had not installed the plant facilities required for their manufacture.

We think the trial judge was correct in his ruling. There was only a stated intention to enter into this additional production with no overt act performed in connection therewith and no expenditure of money to provide the required facilities. Preparedness and capacity to engage in a business mean more than an intention so to do and an ability to buy the necessary facilities. **Stearns v. Tinker and Rasor**, 252 F. 2d 589, 606, C. A. 9; **Triangle Conduit and Cable Co., Inc. v. National Electric Products Corporation**, 152 F. 2d 398, C. A. 3; **American Banana Co. v. United Fruit Co.**, 166 F. 261, C. A. 2; affirmed 213 U. S. 347; **Cf. Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.**, 166 F. 254, C. A. 2.

The plaintiff objected to the measure of damages the trial judge allowed in proving loss to the business. In appeal numbered 14545, we disallowed the item of loss to business, on the ground that it was a duplication of damages. It is not necessary to discuss the question further here.

The plaintiff had a theory of damages which it called its "mature year concept." By this theory, it sought to prove damages subsequent to the date of filing suit, the cut-off date for damages, as adopted by the trial judge. It was claimed by the plaintiff that it would have a progressive growth for about five years and then level off. At the end of this period it would have its mature growth. The theory of the plaintiff is that it was deprived of two years of this maturity by the alleged illegal acts of the defendant. This was tied up with a fifty-year lease on certain river-front property, which the plaintiff claimed would be the life of the business. Therefore, these mature years were forever lost.

The trial judge excluded evidence offered in support of this theory as being too speculative and remote. We

agree. It is equally speculative as the proof which we reject in case No. 14545.

The plaintiff claims the right to recover damages that accrued subsequent to the date of filing suit. Counsel for the defendant claim that the court allowed evidence on this element of damages and quotes instructions of the judge to the jury, during the progress of the trial, to that effect. As we read his final instructions to the jury, it appears that he allowed no damages after the filing date of the complaint.

The rule is that the plaintiff should be entitled to recover damages that accrue after the filing date, provided they are proximately caused by the wrongful and illegal acts committed by the defendant before the complaint was filed. **Lawlor v. Loewe**, 235 U. S. 522, 536; **Flintkote v. Lysfjord**, 246 F. 2d 368, 394, C. A. 9, cert. denied, 355 U. S. 835; **Connecticut Importing Co. v. Frankfort Distilleries**, 101 F. 2d 79, 81, C. A. 2. Such damages must be proved with reasonable certainty and must not be speculative or remote. **Bigelow v. R. K. O. Radio Pictures**, 327 U. S. 251; **Story Parchment Co. v. Paterson Co.**, 282 U. S. 555; **Eastman Kodak Co. v. Southern Photo Co.**, 273 U. S. 359.

The judgment of the District Court is affirmed in this appeal, except as to the rule above stated for the allowance of damages accruing after the date the action was begun.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

Volasco Products Company,
Plaintiff-Appellee,
vs.
Lloyd A. Fry Roofing Company,
Defendant-Appellant.
No. 14,545.

Filed Sept. 12, 1962, Carl W. Reuss, Clerk.

Before: Cecil, Chief Judge, O'Sullivan, Circuit Judge, and Boyd, District Judge.

Appeal from the United States District Court for the Eastern District of Tennessee.

This Cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed and the case remanded to the District Court for a new trial.

Approved for entry:

s/ Lester L. Cecil,
Chief Judge.

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On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

s/ Lester L. Cecil,
Chief Judge.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

Volasco Products Company,
Plaintiff-Appellant,
vs.
Lloyd A. Fry Roofing Company,
Defendant-Appellee.
No. 14,547.

Filed Sept. 12, 1962, Carl W. Reuss, Clerk.

Before: Cecil, Chief Judge, O'Sullivan, Circuit Judge, and Boyd, District Judge.

Appeal from the United States District Court for the Eastern District of Tennessee.

This Cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed, except that the plaintiff should be entitled to recover damages that accrue after the date of filing the complaint, provided they are proximately caused by the wrongful and illegal acts committed by the defendant, before the complaint was filed.

Approved for entry:

s/ Lester L. Cecil,
Chief Judge.

Section 1, Sherman Act.

July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209; August 17, 1937, Chap. 690, Title VIII, 50 Stat. 693; July 7, 1955.

Public Law 135, 84th Congress, 1st Session; 15 U. S. Code, Sec. 1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . .

Section 2, Sherman Act.

July 2, 1890, Chap. 647, Sec. 2, 26 Stat. 209; July 7, 1955, Public Law 135, 84th Congress, 1st Session; 15 U. S. Code, Sec. 2.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 2 (a) and (b), Clayton Act

Oct. 15, 1914, c. 323, § 2, 38 Stat. 730; June 19, 1936, c. 592, § 1, 49 Stat. 1526; 15 U. S. Code, Sec. 13.

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction

of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . .

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issr an order terminating the discrimination: Provided, however, That nothing contained in sections 12, 13, 14-21 and 22-27 of this title shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Section 4, Clayton Act.

October 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731; 15 U. S. Code, Sec. 15.

Sec. 4. Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Constitution of the United States.

Amendment VII—Civil Trials.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

28 U. S. C., Section 2072, Fed. Rules Civ. Pro. 49 and 51:

Section 2072. Rules of civil procedure for district courts.

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States and of the District Court for the Territory of Alaska in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

* * * * * * *

Federal Rules of Civil Procedure 49 and 51 provide:

Rule 49. Special Verdicts and Interrogatories.

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted

as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

Rule 51. Instructions to Jury: Objection. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written

requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 61. Harmless Error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the partie is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Tennessee Code Annotated:

20-1317. Verdict applied to good count.—If any counts in a declaration are good, a verdict for entire damages shall be applied to such good counts (Code 1858, § 2969 [deriv. Acts 1801, ch. 6, § 63]; Shan., § 4694; Code 1932, § 8824).

TESTIMONY OF GEORGE C. KRUG ON DIRECT EXAMINATION.

By Mr. Wilson (231):

Q. Then the other product which I have and ask you to identify——

A. This is a 210-pound strip shingle. It is put up in bundles. It takes three bundles to make a roofing square, a hundred square feet on a roof.

The Court: What is the difference between a shingle and the asphalt itself?

The Witness: Between this and say the 90 pound rolled roofing?

The Court: Yes.

The Witness: Nothing at all, except that this is cut out. It is cut in three foot lengths and these tabs are cut out. The felt is the same and the asphalt.

The Court: Are the ingredients of it——

The Witness: Are practically identical, the (232) ingredients in the 90 pound mineral rolled roofing. It is merely this one is cut in a three foot long shape with these cutouts here to simulate a shingle.

By Mr. Wilson:

Q. Then what is the difference in manufacture between that shingle or the rolled roofing and the smooth surface roofing?

A. I would like to go back to felt and carry on from there. It would make it a little clearer, I believe. After the felt is saturated, depending on whether it is the 45, 55 or 65 pound smooth rolled roofing, you would have a different weight of dry felt saturated for the different products. It is run through——

Mr. Weitzenfeld: Excuse me.

The Court: Don't interrupt the witness when he is trying to testify, counsel. Let him testify.

Mr. Weitzenfeld: But, your Honor, he has never manufactured——

The Court: That is all right. The objection is overruled. Let the witness testify. Don't continue to interrupt him while he is on the stand.

Go ahead.

A. I have seen the products manufactured in numerous plants. The saturated felt of the proper grade is then run through a coater, which sprays a coat of coating asphalt on (233) top of the saturated felt. It is then sprinkled with mica or talc to keep it from sticking and run through cooling drums for cooling prior to winding it up in a roll. The 90 pound rolled roofing is the same process up to that point, except it goes on while the asphalt is still hot and granules are sprinkled on that hot asphalt and imbedded by rollers into the asphalt.

Then it goes to a winder and is wound up in the finished package.

The shingle, instead of being wound up on the winder, goes to the shingle cutter and is cut in this pattern. The same product as the 90 pound rolled roofing.

Mr. Wilson: I will ask that the sample of the shingle be marked as Exhibit 10.

Mr. Weitzenfeld: Same objection.

The Court: Same ruling.

(Exhibit 10 was filed.)